SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 22

POSTUM CEREAL COMPANY, INCORPORATED,
APPELLANT,

vs.

CALIFORNIA FIG NUT COMPANY

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FILED JULY 1, 1926

(30,462)

(30,462)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 121

POSTUM CEREAL COMPANY, INCORPORATED,
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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1925

[fol. 1] **APPEAL FROM COMMISSIONER OF PATENTS**

Patent Appeal Docket No. 1621

POSTUM CEREAL COMPANY, INC., Appellant,

vs.

CALIFORNIA FIG NUT COMPANY

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Patent Appeal Docket

Re Cancellation No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY

PETITION FOR APPEAL

Your petitioner, Postum Cereal Company, Inc., a corporation of Delaware, of Wilmington, Delaware, and Battle Creek, Michigan, respectfully represents:

That on May 18, 1920 it succeeded to the business of the Postum Cereal Company, a Michigan corporation of Battle Creek, Michigan, which in 1916 succeeded to the business of Postum Cereal Company, Ltd., of Battle Creek, Michigan, a limited partnership association of the State of Michigan.

That prior to the year 1898 petitioner's predecessor, Postum Cereal Co., Ltd., placed upon the market a cereal breakfast food to which it applied as a trade-mark the word "Grape-Nuts." That the said trade-mark was, at the time of its adoption by petitioner's said predecessor, in all respects arbitrary, new, original, characteristic and distinctive, and had never before been used, and thereupon petitioner's said predecessor applied the said trade-mark to packages containing its said product by printing the same thereon, and using the same in connection therewith in other convenient ways, and petitioner's predecessors and since petitioner's succession as aforesaid, petitioner has continued without interruption, from prior to the year 1898 to the present time, so to use said trade-mark in interstate and foreign commerce, and petitioner is now so using [fol. 2] the same and has built up a wide and favorable reputation in its said product under the said trade-mark, so that said trade-mark is of great value to petitioner and indicates petitioner as the source and

origin of the product to which it is applied, and indicates petitioner as the manufacturer thereof, and has no other meaning.

That after due and proper proceedings, in that behalf, petitioner's predecessor, Postum Cereal Co., Ltd., duly cause the registration of its said trade-mark as follows:

No. 31,689 June 14, 1898.
No. 51,153 April 3, 1906.
No. 71,262 Nov. 10, 1908.
No. 80,492 December 27, 1910.

That California Fig Nut Company, Orange, California, on January 18, 1921, registered a trade-mark for breakfast cereals, the essential features of which consist of the words "Fig Nuts," said registration being under Act of March 1920, Sec. 1 (b).

That on February 2, 1921 petitioner filed a petition to cancel the said mark "Fig Nuts" registered by California Fig Nut Company.

That on March 14, 1921 answer was filed by California Fig Nut Company.

That on December 7, 1921, the case was heard by the Examiner of Interferenes who, on May 12, 1921 rendered a decision dismissing the petition for cancellation.

That on May 25, 1921 your petitioner filed an appeal to the Commissioner of Patents from the decision of the Examiner of Interferences.

That on January 15, 1923, the case was heard by the First Assistant Commissioner of Patents who, on February 26, 1923, affirmed the decision of the Examiner of Interferences dismissing your petitioner's petition for cancellation.

That within forty days from the date of said decision of the First Assistant Commissioner of Patents Postum Cereal Company, Inc. pursuant to Sections 4912 and 4913 of the Rev. Stats. of the United States, gave notice to the Commissioner of Patents of its appeal to this Court from the decision of the First Assistant Commissioner of Patents sustaining the petition for cancellation as aforesaid, and has filed with him in writing certain reasons of appeal.

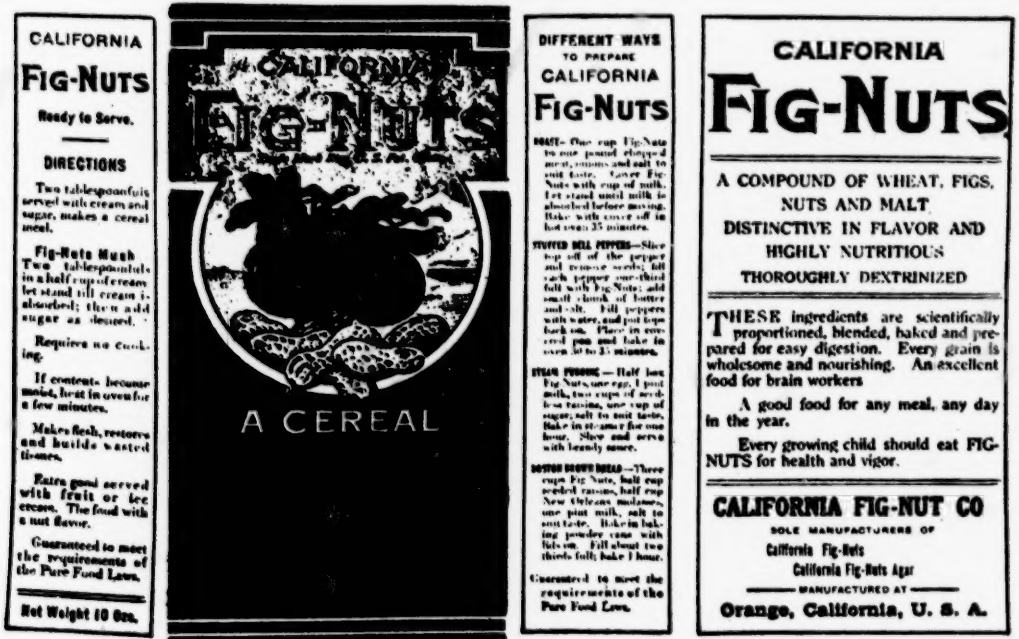
That your petitioner has requested the Commissioner of Patents to furnish the clerk of this Court a certified transcript of the record and procedings relating to said cancellation, which transcript is to be deemed and taken as a part hereof.

Wherefore, your petitioner prays that this its said appeal may be heard upon and for the reasons assigned therefor to the Commissioner of Patents as aforesaid, and that said appeal may be determined and the decision of the First Assistant Commissioner of Patents be revised and reversed, that justice may be done in the premises.

Postum Cereal Co,. Inc., by Frank F. Reed, Edward S. Rogers, Attorneys.

Exhibit in Evidence

• CALIFORNIA FIG-NUTS



CALIFORNIA

FIG-NUTS

Ready to Serve.

DIRECTIONS

Two tablespoonfuls served with cream and sugar, makes a cereal meal.

Fig-Nuts Mush

Two tablespoonfuls in a half cup of cream, let stand till cream is absorbed; then add sugar as desired.

Requires no cooking.

If content- become moist, heat in oven for a few minutes.

Makes flesh, restores and builds wasted tissues.

Extra good served with fruit or ice cream. The food with a nut flavor.

Guaranteed to meet the requirements of the Pure Food Laws.

Net Weight 10 Ozs.

CALIFORNIA FIG-NUTS

A CEREAL

DIFFERENT WAYS TO PREPARE CALIFORNIA FIG-NUTS

ROAST- One cup Fig-Nuts to one pound chopped meat, onions and salt to suit taste. Cover Fig-Nuts with cup of milk. Let stand until milk is absorbed before mixing. Bake with cover off in hot oven 35 minutes.

STUFFED BELL PEPPERS—Slice top off of the pepper and remove seeds; fill each pepper one-third full with Fig-Nuts; add small chunk of butter and salt. Fill peppers with water, and put tops back on. Place in covered pan and bake in oven 30 to 35 minutes.

STEAM PUDDING — Half box Fig-Nuts, one egg, 1 pint milk, two cups of seedless raisins, one cup of sugar, salt to suit taste. Bake in steamer for one hour. Slice and serve with brandy sauce.

BOSTON BROWN BREAD—Three cups Fig-Nuts, half cup seeded raisins, half cup New Orleans molasses, one pint milk, salt to suit taste. Bake in baking powder cans with lids on. Fill about two thirds full; bake 1 hour.

Guaranteed to meet the requirements of the Pure Food Laws.

CALIFORNIA

FIG-NUTS

A COMPOUND OF WHEAT, FIGS, NUTS AND MALT DISTINCTIVE IN FLAVOR AND HIGHLY NUTRITIOUS THOROUGHLY DEXTRINIZED

THESE ingredients are scientifically proportioned, blended, baked and prepared for easy digestion. Every grain is wholesome and nourishing. An excellent food for brain workers

A good food for any meal, any day in the year.

Every growing child should eat FIG-NUTS for health and vigor.

CALIFORNIA FIG-NUT CO

SOLE MANUFACTURERS OF

California Fig-Nuts

California Fig-Nuts Agar

MANUFACTURED AT

Orange, California, U. S. A.

No. 1621 Patent Appeal Docket.
Postum Cereal Company, Incorporated, v.
California Fig Nut Company.

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[fol. 3] CERTIFICATE OF COMMISSIONER OF PATENTS

2—390

Department of the Interior.
United States Patent Office.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of Certain Papers, including Printed Testimony, as used before the Office, in the matter of Cancellation Proceeding Number 666, Postum Cereal Company vs. California Fig Nut Company, Trade-Mark for Breakfast Cereals; said Papers being the Record for the Court of Appeals of the District of Columbia.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this 23rd day of April, in the year of our Lord, one thousand nine hundred and twenty-three and of the Independence of the United States of America the one hundred and forty-seventh.

Wm. A. Kinnan, Acting Commissioner of Patents. (Seal of Patent Office, United States of America.)

(Here follows diagram marked side folio page 3a)

$10, Ck., Rec'd Oct. 20, 1920. A. C. C., U. S. Pat. Office

Serial No. 138,540, Paper No. —

Application

PETITION AND POWER OF ATTORNEY

To the Commissioner of Patents:

The undersigned presents herewith a drawing and five specimens or fac-similes of its trade-mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the provisions of the Act of March 19, 1920, and hereby appoints Arthur E. Wallace, of 537 S. Dearborn St., Chicago, Ill., Registered Attorney No. 5706, (General Counsel of Mida's Trade-Mark Bureau) its true and lawful attorney to prosecute this application for registration, with full power of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the patent office connected therewith.

In testimony hereto we have hereunto set our hand and seal this Fifth day of August, A. D. 1920.

California Fig-Nut Company. Alfred Huhn, Secy.

Revenue Stamp.

[fol. 4] STATEMENT

To all whom it may concern:

Be it known, that California Fig-Nut Company, a corporation duly organized under the laws of the State of California, and located in the City of Orange, County of Orange, State of California, and doing business in the City of Orange in the State of California, has adopted and used the trade-mark shown in the accompanying drawing.

The particular description of goods to which said trade-mark is appropriated is: Breakfast Cereals in class 46: Foods and Ingredients of Foods.

The trade mark has been used continuously in the business of the applicant since May 23, 1914.

The trade-mark is applied or affixed to the goods, or to the packages containing the same by [placing thereon printed labels upon which the trade-mark is shown]* printing the name on cartons containing the goods.

California Fig-Nut Company. Alfred Huhn, Secy.

AFFIDAVIT OF ALFRED HUHN

STATE OF CALIFORNIA,
County of Orange, ss:

Alfred Hurn being duly sworn deposes and says that he is Secretary of the Corporation the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes the said corporation is the owner of the trade-mark sought to be registered, that no other person, firm, corporation or association to the best of his knowledge and belief has the right to use said trade-mark in the United States of America, on merchandise of the same descriptive properties as those recited in the foregoing statement; that such trade-mark is used by the applicant in commerce among the several states of the United States; that the description and drawing presented truly represents the trade-mark sought to be registered; that the specimens (or facsimiles) show the trade-mark as actually used upon the goods; and that the mark has been in bona fide use for not less than one year in interstate or foreign commerce by the applicant or its predecessors in business.

Alfred Huhn.

Subscribed and sworn to before me, a Notary Public, within and for said County and State, this Fifth day of August, 1920. E. K. Weiss, Notary Public. (Seal.)

(Here follows trade-mark paper No. 139,066, marked side folio page 5)

[*Words enclosed in brackets erased in copy.]

File Wrapper and Contents

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UNITED STATES PATENT OFFICE.

CALIFORNIA FIG-NUT COMPANY, OF ORANGE, CALIFORNIA.

TRADE-MARK FOR BREAKFAST CEREALS.

ACT OF MARCH 19, 1920.

139,066. Registered Jan. 18, 1921.

Application filed October 20, 1920. Serial No. 138,540.

STATEMENT.

To all whom it may concern:

Be it known that CALIFORNIA FIG-NUT COMPANY, a corporation duly organized under the laws of the State of California, and located in the city of Orange, county of Orange, State of California, and doing business in the city of Orange, in the State of California, has adopted and used the trade-mark shown in the accompanying drawing.

The particular description of goods to which said trademark is appropriated is: breakfast cereals, in Class 46: Foods and ingredients of foods.

The trademark has been used continuously in the business of the applicant since May 23, 1914.

The trade-mark is applied or affixed to the goods, or to the packages containing the same by printing the name on cartons, containing the goods.

CALIFORNIA FIG-NUT COMPANY.
ALFRED HUHN,
Secy.

FIG-NUTS

DECLARATION.

State of California county of Orange ss.

ALFRED HUHN being duly sworn deposes and says that he is secretary of the corporation the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes the said corporation is the owner of the trade-mark sought to be registered, that no other person, firm, corporation or association to the best of his knowledge and belief has the right to use said trade-mark in the United States of America, on merchandise of the same descriptive properties as those recited in the foregoing statement; that such trade-mark is used by the applicant in commerce among the several States of the United States; that the description and drawing presented truly represent the trade-mark sought to be registered; that the specimens (or facsimiles) show the trade-mark as actually used upon the goods; and that the mark has been in *bona fide* use for not less than one year in interstate or foreign commerce by the applicant or its predecessors in business.

ALFRED HUHN.

Subscribed and sworn to before me, a notary public, within and for said county and State this fifth day of August, 1920.

[L. S.] E. K. WEISS,
Notary Public.

[fols. 6-9] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY

Subject-matter: Trade-mark

Testimony on Behalf of California Fig Nut Company

IN THE UNITED STATES PATENT OFFICE

NOTICE OF OPPOSITION

#139,066

In the Matter of the Registration of a Trade-mark for Breakfast Cereals, by CALIFORNIA FIG NUT COMPANY, Orange, California, under Act of March 19, 1920, Sec. 1 (b), January 18, 1921.

To the Honorable Commissioner of Patents:

The undersigned, Postum Cereal Company, Inc., a corporation of [fol. 10] Delaware, of Wilmington, Delaware, and Battle Creek, Michigan, deems itself injured by such registration, and hereby petitions to cancel the same, upon the following grounds:

1. Petitioner is a Delaware corporation which, on May 18, 1920, succeeded to the busines of Postum Cereal Company, a Michigan corporation, of Battle Creek, Michigan, which in 1916 succeeded to the business of Postum Cereal Co., Ltd., of Battle Creek, Michigan, a limited partnership association of the State of Michigan.

2. That prior to the year 1898 petitioner's predecessor, Postum Cereal Co., Ltd., placed upon the market a cereal breakfast food to which it applied as a trade-mark the word "Grape-Nuts." That the said trade-mark was, at the time of its adoption by petitioner's said predecessor, in all respects arbitrary, new, original, characteristic and distinctive, and had never before been used, and thereupon petitioner's said predecessor applied the said trade-mark to packages containing its said product by printing the same theeron, and using the same in connection therewith in other convenient ways, and petitioner's predecessors and, since petitioner's succession as aforesaid, petitioner has continued without interruption, from prior to the year 1898 to the present time, so to use said trade-mark in interstate and foreign commerce, and petitioner is now so using the same and has built up a wide and favorable reputation in its said product under the said trade-mark, so that said trade-mark is of great value to petitioner and indicates petitioner as the source and origin of the pro-

duct to which it is applied, and indicates petitioner as the manufacturer thereof, and has no other meaning. A specimen of petitioner's label showing the use of its said trade-mark is hereto attached.

[fol. 11] 3. After due and proper proceedings in that behalf, petitioner's predecessor, Postum Cereal Co., Ltd., duly caused the registration of its said trade-mark as follows:

No. 31,689—June 14, 1898.
4,101—Pub. Feb. 6, 06.
No. 51,153—April 3, 1906.
33,778—Sept. 8, 08.
No. 71,262—November 10, 1908.
52,074—Oct. 25, 10.
No. 80,492—December 27, 1910.

That said registrations are valid and subsisting and petitioner is now the owner thereof.

4. The petitioner's predecessor, Postum Cereal Co., Ltd., is the same party as Postum Cereal Co., Ltd., opposer in Opposition No. 2098.

5. That the mark to cancel the registration of which this petition is filed, was registered under the Act of March 19, 1920, Sec. 1 (b), on January 18, 1921, and the essential feature of said mark, the word "Fig Nuts" so nearly resembles petitioner's said trade-mark, the word "Grape-Nuts," long previously owned and in use by it and appropriated to merchandise of the same descriptive porperties, as to be likely to cause confusion or mistake in the minds of the public and to deceive purchasers, and that said registrant was not entitled to the exclusive or any use, at or since the date of its application for registration, of the word "Fig-Nuts", and that petitioner deems itself injured by said registration and therefore files this petition to cancel the same.

Please recognize as attorneys for the undersigned in this proceed-
[fol. 12] ing, Frank F. Reed and Edward S. Rogers, of Chicago, Illinois, and Francis L. Browne and Francis M. Phelps, of Washington, D. C.

Postum Cereal Company, Inc., by Arthur B. Williams, Secretary, Petitioner. Frank F. Reed, Edward S. Rogers, Francis L. Browne, Francis M. Phelps, Attorneys for Petitioner.

STATE OF MICHIGAN,
County of Calhoun, ss:

Arthur B. Williams, being sworn, deposes and states that he is Secretary of the Postum Cereal Company, Inc., petitioner herein; that petitioner is a corporation, and that affiant makes this affidavit for it and in its behalf, and is duly authorized so to do; that he has

read the above and foregoing petition and knows the contents thereof, and that the same is true.

Arthur B. Williams.

Subscribed and sworn to before me a Notary Public in and for the County and State aforesaid, this 29th day of January, A. D. 1921, and I further certify that I am fully authorized under the laws of the State of Michigan to administer oaths. Helen D. Hinman, Notary Public.

[fol. 13] IN THE UNITED STATES PATENT OFFICE

Cancellation Application No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY

ANSWER

To the Honorable Commissioner of Patents, Washington, D. C.

SIR: In the matter of the application of Postum Cereal Company, Inc., for cancellation of trade-mark registration No. 139,066, dated January 18, 1921, for Breakfast Cereals, comes now, California Fig Nut Company and for answer to said application for cancellation says:

1. This registrant has no knowledge or information other than that contained in said application for cancellation concerning the statements contained in paragraph numbered 1 of the application for cancellation, and therefore denies the same and demands strict proof thereof.

2. This registrant admits that the petitioner has upon the market a cereal breakfast food to which is applied the name "Grape-Nuts", and admits that the name "Grape-Nuts" was at the time of its adoption by petitioner or petitioner's predecessor in business, new and original as applied to a cereal breakfast food, and admits that petitioner or petitioner's predecessor in business applied the said trade-mark to packages containing its said product by printing thereon and using the same in connection therewith in other ways, [fol. 14] and that the use of the name "Grape-Nuts" has been continued without interruption for several years in interstate and foreign commerce, and admits that petitioner is now using the same and has built up a wide and favorable reputation in its product under the name "Grape-Nuts", and admits that said name indicates petitioner as the source and origin of the product to which it is applied, and as the manufacturer thereof, and admits that the specimen of pe-

titioner's label attached to the application for cancellation is a correct specimen of petitioner's label.

But this registrant denies that said name "Grape-Nuts" as used by petitioner upon a cereal breakfast food was at the time of its adoption, or is now, arbitrary or characteristic and distinctive of petitioner's goods.

3. This registrant admits that the registrations mentioned in paragraph numbered 3 of the application for cancellation have been made, but denies that said registrations are valid.

4. This registrant has no knowledge or information concerning Opposition No. 2098 mentioned in paragraph numbered 4 of the application for cancellation, and therefore denies the same and demands strict proof thereof.

5. This registrant admits that its mark was registered under the Act of March 19, 1920, and denies that the feature of said mark consisting of the name "Fig-Nuts" so nearly resembles petitioner's alleged trade-mark "Grape-Nuts" as to be likely to cause confusion or mistake in the minds of the public or to deceive purchasers, and denies that this registrant's mark is appropriated to merchandise of the same descriptive properties as petitioner's alleged trade-mark, and denies that registrant was not entitled to the exclusive use of its [fol. 15] said trade-mark at or since the date of its application for registration, or of the name "Fig-Nuts", and denies that petitioner would be injured by said registration.

6. For further and affirmative defense to the application for cancellation, this registrant says:

(a) That the trade-mark registration sought in this proceeding to be cancelled covers a trade-mark name and design so essentially different in form, appearance and meaning from the petitioner's alleged trade-mark, that there would be no probability of confusion or mistake in the minds of the public, or of deception to purchasers of the registrant's goods or of the petitioner's goods, and registrant says that its said trade-mark has a well-defined and well-understood meaning in the mind of the public as referring to a product containing and including some part of figs and nuts as ingredients of said product, and the alleged trade-mark "Grape-Nuts" of the petitioner has a definite and distinctive different meaning in the mind of the public and of the trade of a product containing as ingredients some part of grapes and nuts.

(b) That the goods upon which petitioner uses its alleged trade-mark name "Grape-Nuts" as registrant is informed and believes, do not contain as ingredients, any parts of grapes or of nuts, but contain instead, as shown by registration No. 31689, cereal food; as shown by registration No. 51153, breakfast foods prepared solely from cereals; as shown by registration No. 71262, a cereal preparation composed of wheat and New Orleans molasses for making beverages; and as shown by registration No. 80492, prepared wheat and

barley breakfast foods, each of said registrations being set forth in paragraph numbered 3 of the application for cancellation; and that the use by the petitioner of the descriptive name "Grape-Nuts" on [fol. 16] foods containing as ingredients no part of grapes and no part of nuts, is deceptive and unlawful, in that the use of the descriptive name "Grape-Nuts" is likely to mislead purchasers of the goods into believing that they are purchasing goods containing at least a part of grapes and nuts as ingredients of the goods.

(c) That by reason of the deceptive impression carried to the minds of purchasers by the use of the descriptive name "Grape-Nuts" on petitioner's goods, the said four registrations mentioned and as set forth in the application for cancellation are invalid and of no effect, and the petitioner for said reason has no rights in the use of said deceptive name "Grape-Nuts" that can be protected in equity.

7. And registrant further says, that the goods upon which the applicant for cancellation claims to use its alleged "Grape-Nuts" trade-mark are not goods of the same descriptive properties or of similar descriptive properties as the goods mentioned and set forth in its registration, and that registrant was and is entitled to the exclusive use of its registered trade-mark.

8. That registrant believes it is the sole and exclusive owner of the trade-mark registered by it for the goods set forth therein.

Wherefore, registrant prays that the application for cancellation be dismissed.

California Fig Nut Company, by Alfred Kuhn, Secretary.
(Seal.)

[fol. 17] STATE OF CALIFORNIA,
County of Orange, ss:

On this 7th day of March, 1921, before me a notary public, in and for the County and State aforesaid, personally appeared Alfred Huhn, who being by me duly sworn, deposes and says that he is Secretary of the corporation, California Fig Nut Company, the registrant in the above entitled proceeding; that he signed and executed the foregoing answer to the application for cancellation herein as such in behalf of California Fig Nut Company; that he is duly authorized to execute the foregoing answer; that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

E. K. Weiss, Notary Public. (Seal.)

IN THE UNITED STATES PATENT OFFICE

Cancellation Application No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY

NOTICE OF TAKING TESTIMONY

To Messrs. Frank F. Reed and Edward S. Rogers, Attorneys for Postum Cereal Company, Inc., Peoples Gas Building, Chicago, Illinois.

DEAR SIRS: Please take notice that on Friday, June 3, 1921, at 9:00 o'clock in the forenoon, at the office of John C. Stick, 811 [fol. 18] Washington Building, Los Angeles, California, before N. P. Moordyke, a notary public, we shall proceed to take the testimony of Albert Cohn, Alfred Hurn, A. Croe, E. M. Harrison, H. C. Swartz, J. T. Lang, A. A. Hunt, E. Baruch, C. S. Kious, W. J. Zeiss and Mrs. L. G. Marsh, all of Los Angeles, California, and perhaps others as witnesses in behalf of the California Fig Nut Company in the above entitled cancellation proceeding.

The examination will begin at the time named and continue from day to day until completed. You are invited to attend and cross-examine the witnesses if you so see fit.

California Fig Nut Company, by Arthur E. Wallace, Its Attorney.

Received a copy of the above notice this 20th day of May, 1921.

Frank W. Reed and Edward S. Rogers, Attorneys and Solicitors for Postum Cereal Company, Inc., Petitioner.

IN THE UNITED STATES PATENT OFFICE

Cancellation Application No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG-NUT COMPANY

DEPOSITIONS

Before the Commissioner of Patents in the Matter of the Application for Cancellation of Postum Cereal Company, Inc., Against the Registration of a Trade-mark of California Fig-Nut Company, No. 139,066, registered January 18, 1921.

[fol. 19] Depositions of Witnesses Examined on Behalf of California Fig-Nut Company, Pursuant to the Annexed Notice, at Room No.

811 Washington Building, Los Angeles, California, on the 3rd Day of June, 1921.

Present: Frederick S. Lyon, Esq., representing Frank F. Reed and Edward S. Rogers, attorneys for Postum Cereal Company, Inc., Petitioner, and John C. Stick, Esq., representing Arthur E. Wallace, Esq., attorney for California Fig-Nut Company.

Whereupon the following proceedings were had:

By stipulation, the depositions are taken before E. C. Thompson, a Notary Public within and for the County of Los Angeles, State of California, substituted for N. B. Moerdyke.

Mrs. L. G. Marsh, being first duly sworn, doth depose and say, in answer to interrogatories proposed to her by John C. Stick, Esq., counsel for California Fig-Nut Company, as follows, to-wit:

Question 1. What is your name?
Answer 1. L. G. Marsh.
Q. 2. What is your age?
A. 2. 52.
Q. 3. What is your occupation?
A. 3. Sales lady.
Q. 4. And your residence?
A. 4. Orange, California.
Q. 5. Are you acquainted with the defendant company, California Fig-Nut Company?
A. 5. Yes, sir.
Q. 6. Have you ever been connected with that company?
[fol. 20] A. 6. Yes, sir.
Q. 7. How long have you been connected with the company?
A. 7. I was with them seven years.
Q. 8. Were you with it at its origin?
A. 8. Yes.
Q. 9. At the beginning of the business of the California Fig-Nut Company was the corporate name California Fig-Nut Company?
A. 9. No.
Q. 10. What was the name of the company at the beginning?
A. 10. California Breakfast Food Company was first.
Q. 11. That company was organized first, the California Breakfast Food Company?
A. 11. Yes, sir.
Q. 12. And then subsequent to that what proceedings were had?
A. 12. They changed the name to the California Fig-Nut Company.
Q. 13. Were you connected with the California Breakfast Food Company?
A. 13. Yes, sir.
Q. 14. Were you one of the incorporators of that company?
A. 14. No, I was not.
Q. 15. You worked for them?
A. 15. Yes.

Q. 16. What position did you hold

A. 16. I was sales lady and demonstrator.

Q. 17. Did you work in the office at any time?

A. 17. No, I never worked in the office, but I worked in the factory and made the goods.

[fol. 21] Q. 18. Do you know of your own knowledge whether the name California Breakfast Food Company was changed at any time?

A. 18. It was never changed until it was changed to the California Fig-Nut Company.

Q. 19. Do you know when that was?

A. 19. It must have been about two years ago. I don't know the exact date.

Q. 20. At the beginning of your work with the California Breakfast Food Company what products were they making?

A. 20. The California Breakfast Food Company was making fig-nuts laxatives.

Q. 21. And the name of the product itself was "California fig-nuts laxatives?"

A. 21. California Breakfast Food Company California fig-nuts laxatives.

Q. 22. That was the name of the food that was sold?

A. 22. Yes, sir, and the first food that we put up.

Q. 23. Do you know what year that was in?

A. 23. About 1914.

Q. 24. Did they subsequent to that at any time make a food under any other name or variation from that?

A. 24. Later they made the California Fig-Nuts DeLuxe.

Q. 25. About when did they make the California Fig-Nuts De-Luxe with reference to the beginning of the company?

A. 25. In 1916.

Q. 26. It was about how long after the company began putting out products?

A. 26. It was pretty near two years.

Q. 27. Did they subsequent to that make any other product?

[fol. 22] A. 27. They made the California Fig-Nuts Agar.

Q 28. When did they begin putting that on the market, do you know?

A. 28. In 1918.

Q. 29. And subsequent to that did they make any other food under any other name?

A. 29. No other name until they changed it to California Fig-Nut Company.

Q. 30. And then what was the name of the product after that?

A. 30. California Fig-Nuts, and California Fig-Nuts Agar.

Q. 31. And from that time on the same food has been made as California Fig-Nut and California Fig-Nuts Agar?

A. 31. Yes, sir.

Q 32. Has that been changed?

A. 32. No.

Q. 33. Is that the product they are making now?

A. 33. Yes.

Q. 34. Was the name California Fig-Nut used at all times to your knowledge on the products that were manufactured and sold by the California Breakfast Food Company, and later the California Fig-Nut Company?

A. 34. Yes.

Q. 35. When did they first begin to use the name California Fig-Nuts, do you remember the year?

A. 35. About a year ago.

Q. 36. Was the name California Fig-Nuts in connection with Laxative DeLuxe, and Agar, used in other products that you have mentioned?

A. 36. Yes.

Q. 37. So that the name California Fig-Nuts has been used in [fol. 23] connection with all the products that they have made?

A. 37. Yes.

Q. 38. Where did the California Breakfast Food Company first begin to manufacture its products?

A. 38. In our kitchen out on 76th street in Los Angeles.

Q. 39. How long did they continue to manufacture there?

A. 39. We were there over two years.

Q. 40. Then where did you go?

A. 40. Then we moved ot Orange, California.

Q. 41. How long has it been manufacturing these food products there?

A. 41. Ever since they moved to Orange.

Q. 42. And they are there now?

A. 42. Yes, sir.

Q. 43. What particular work did you do with the California Fig-Nut Company, or California Breakfast Food Company during your connection with it?

A. 43. I helped make the food, went out and sold it, and went out and demonstrated it. I called on the trade, and called on the jobbers.

Q. 44. Where did you make your demonstrations?

A. 44. I made them in Los Angeles, San Diego, Bakersfield, Fresno, Stockton, Sacramento, Oakland, San Francisco.

Q. 45. Ever make any demonstrations in Long Beach?

A. 45. Yes, sir.

Q 46. Did you ever make any demonstrations in Covina?

A. 46. Yes.

Q. 47. Any other places?

[fol. 24] A. 47. San Dimas, Riverside, Pomona, San Bernardino, Highlands, Ontario—that is all.

Q. 48. What did you do with the California Fig-Nut products in these demonstrations?

A. 28. I served them with cream and sugar and made puddings.

Q. 49. You served it to various people?

A. 49. Yes, hundreds of people.

Q. 50. Did you have conversations with them with reference to the California Fig-Nut products?

A. 50. Oh, yes. I always tried to impress on the minds of the people that it was a laxative breakfast food.

Q. 51. In these demonstrations, and in your conversations while you were demonstrating, did you tell them what was contained in the product?

A. 51. I always told them.

Q. 52. What did you say with reference to it?

A. 52. I told them what it was made of; that it was made of figs and nuts and whole wheat flour, bran and malt.

Q. 53. Upon any of these occasions when you were demonstrating did any conversation arise with reference to the California Fig-Nut products and the product known as grape-nuts?

Mr. Lyon: Object to that as leading and suggestive.

A. 53. Yes, we had conversations.

Q. 54. State what conversations actually took place; the substance of them.

Mr. Lyon: That is objected to as incompetent, no foundation laid, indefinite and uncertain. Incompetent unless it is shown that someone representing the Postum Cereal Company was present, or that the time, place and persons present are fixed.

A. 54. (No answer.)

[fol. 25] Q. 55. Do you recall any time or place or persons with whom you had a conversation with reference to grape-nuts and fig-nuts?

A. 55. I remember one time down at Wall's Grocerteria in Long Beach.

Q. 56. Do you recall about when that was?

A. 56. No. It was about that time. I demonstrated down there quite a little. I remember one lady said to me——

Mr. Lyon: We object to the conversation unless all the surrounding circumstances are given and the identity of the party established. Otherwise it is objected to as incompetent, irrelevant and immaterial.

Q. 57. Do you recall the persons with whom your conversation was had?

A. 57. No, I don't know. They were all strangers to me, and I was demonstrating.

Q. 58. Has there been any time during the period of your connection with the California Beakfast Food Company or the California Fig-Nut Company when in your demonstrations or calling upon the trade any confusion of the names grape-nuts and fig-nuts arose?

Mr. Lyon: Objected to as leading and suggestive, and as incompetent, calling for a conclusion of the witness, not the best evidence; not a statement of facts.

A. 58. No.

Q. 59. Did the California Breakfast Food Company at any time sell and ship out of the State of California any of its products?

Mr. Lyon: Objected to as incompetent, irrelevant and immaterial, and no foundation laid.

A. 59. Yes.

Q. 60. Where was the company doing business at that time?

[fol. 26] A. 60. Los Angeles.

Q. 61. Do you recall when the first shipment was made out of the State of California?

A. 61. I cannot say the dates off hand.

Q. 62. In what year?

A. 62. In the year 1915 we shipped to Chicago.

Q. 63. Was there any book or record kept by the California Breakfast Food Company or the California Fig-Nut Company with reference to orders and sales?

A. 63. Yes.

Q. 64. Did you ever see that book?

A. 64. I used to see this little order book. All the orders were put down in that book.

(Book handed to Mr. Lyon.)

Q. 65. I show you a book marked "Fig-Nuts sales book" and the word "Day" and "Orders" written on the outside, and ask you if you know what that book is?

A. 65. Yes, I know what that book is.

Q. 66. What is it?

A. 66. It is where we used to put our orders down as they came in. When they were shipped we used to mark that they were shipped.

Q. 67. What mark was used to show that they were shipped?

A. 67. Just a little check mark.

Q. 68. And you saw that book from time to time?

A. 68. Yes, sir. I used to be interested in this book.

Q. 69. And you made entries in it yourself?

A. 69. Not myself.

Q. 70. Who made the entries?

A. 70. My daughter.

Q. 71. Do you recognize her handwriting?

A. 71. Yes, sir. This is her handwriting.

[fol. 27] Q. 72. And do you know that this book contains actual orders that were received, and goods shipped?

A. 72. Yes, sir.

Q. 73. I call your attention to an entry in this book just referred to, under the figures at the head of the column, 1914. What does that represent?

A. 73. The year we started.

Q. 74. That was the year. Dated 8-18. Shipped Kenny & Truex, one case, Grants Pass, Oregon.

A. 74. Yes. I remember very well when that order came in. It pleased us, as it came to us unsolicited.

Q. 75. Was that order shipped?

A. 75. Yes, sir.

Q. 76. And paid for by them?

A. 76. Yes, sir.

Q. 77. Date August 13, Merritt & Company, one case, Gold Hill, Oregon. Was that order received and the goods shipped?

A. 77. Yes, sir.

Q. 78. And paid for?

A. 78. Yes, sir.

Q. 79. And on the same date, Charles F. Schuffilin, one case, Medford, Oregon. Was that order received and the goods shipped?

A. 79. Yes, sir.

Q. 80. And paid for?

A. 80. Yes, sir.

Q. 81. August 14, Salem Mercantile Company, Salem, Oregon. Was that order received and the goods shipped, and paid for?

A. 81. Yes, sir.

Q. 82. On August 12th, Canfield & Robinett, one case, Central Point, Oregon. Was that order received and the goods shipped and paid for?

[fol. 28] A. 82. Yes, sir.

Q. 83. On August 20, 1914, Hillsborough Mercantile Company, one case, Hillsborough, Oregon. Was that order received and the goods shipped and paid for?

A. 83. Yes, sir.

Q. 84. August 19th, Higgins & Henricksen, one case, Vancouver, Washington. That order was received and shipped and paid for?

A. 844. Yes, sir.

Q. 85. August 2d, Peoples Supply Company, Roseburg, Oregon, one case. That was received and shipped and paid for?

A. 85. Yes, sir.

Q. 86. On September 9th, Roth Grocery Company, Salem, Oregon, one case, order received and shipped and paid for?

A. 86. Yes, sis.

Q. 87. October 19th, Canfield & Robinett, one case, Central Point, Oregon. Same?

A. 87. Yes, sir.

Q. 88. November 4th, Charles F. Schuffilin, Medford, Oregon, one case. I will read these various items and then ask you, to save time, as to all of them, whether the orders were received, shipped and paid for.

November 18th, Charles F. Schuffilin, one case.

November 27th, E. F. Sanguinette, Yuma, one case.

November 27th, McKee's Cash Store, Phœnix, Arizona, one case.

November 27th, A. & B. Grocery Company, Mesa, Arizona, one case.

December 2d, Steinfeldt Company, Tucson, Arizona, one case.

December 2d, E. S. Salada, Nogales, Arizona, one case.

December 4th, Charles F. Schuffilin, two cases.

[fol. 29] December 11th, Arizona Drug Company, Douglas, Arizona, two cases.

December 12th, John B. Watson, El Paso, Texas, one case.

December 14th, Jaffa Grocery Company, Albuquerque, New Mexico, one case.

December 17th, Babbitt Brothers, Winslow, Arizona, five cases.

December 17th, Babbitt Brothers, Flagstaff, Arizona, five cases.

December 18th, Highland Grocery Company, Albuquerque, New Mexico, one case.

December 24th, Raton Supply Company, Raton, New Mexico, one case.

December 24th, Whitehouse Mercantile Company, Trinidad, Colorado, one case.

December 24th, Snodgrass Food Company, Trinidad, Colorado, one case.

January 9, 1915, Jaffa Grocery Company, Albuquerque, New Mexico, one case.

January 11th, Starr Grocery & Market Company, Pueblo, Colorado, one case.

January 16th, Jaffa Grocery Company, Albuquerque, New Mexico, five cases.

January 19th, Snodgrass Food Company, Trinidad, Colorado, two cases.

January 27th, Raton Supply Company, Raton, New Mexico, two cases.

January 27th, Albert Steinfeldt & Company, Tucson, Arizona, three cases.

January 27th, Snodgrass Food Company, Trinidad, Colorado, ten cases.

February 3d, Clay Poole & Company, Needles, Arizona, two cases.

[fol. 30] February 5th, Enterprise Grocery Company, Nephi, Utah, one case.

February 20th, Arizona Drug Company, Douglas, Arizona, three cases.

February 23d, Whitehouse Mercantile Company, Trinidad, Colorado, one case.

February 23d, Raton Supply Company, Raton, New Mexico, two cases.

February 23d, McKee's Cash Grocery, Phoenix, Arizona, two cases.

February 23d, John Palamera, Anoka, Minnesota, one case.

March 16th, W. N. Gasser Co., Duluth, Minnesota, ten cases.

March 16th, Percy Berthiaume, Superior, Wisconsin, five cases.

March 16th, W. B. Pratt Company, Virginia, two cases.

March 16th, Jaffa Grocery Company, Albuquerque, New Mexico, ten cases.

March 20th, C. H. Schuflilin, Medford, Oregon, two cases.

March 24th, Arizona Drug Company, Douglas, Arizona, five cases.

April 5th, Monarch Grocery Company, Northfield, Minnesota, two cases.

April 20th, Nash Brothers, Grand Forks, North Dakota, 15 cases.

April 20th, J. H. Alten, St. Paul, Minnesota, 15 cases.

April 20th, Fargo Mercantile Company, Fargo, North Dakota, 10 cases.

April 20th, Northern Grocery Company, Demigi, Minnesota, 10 cases.

April 20th, Mrs. J. Eckhart, Mankato, Minnesota, two cases.

[fol. 31] April 20th, George W. Newhall & Company, Minneapolis, 20 cases.

May 1st, Nash Brothers, Grand Forks, North Dakota, 15 cases.

May 10th, J. H. Bible Company, Lovelock, Nevada, one case.

May 14th, Highlands Grocery Company, Albuquerque, New Mexico, one case.

May 17th, Wilcox Grocery Company, Ogden, Utah, one case.

May 17th, Monat-Duenow, Chippeway Falls, Wisconsin, two cases.

May 20th, M. L. Ellison Company, Albert Lea, Minnesota, two cases.

May 20th, Piper Brothers, Madison, Wisconsin, four cases.

May 20th, Stuart and Morrow, Mason City, Iowa, two cases.

May 24th, United Grocery Company, Salt Lake City, Utah, five cases.

May 24th, Boyle Mercantile Company, Midvale, Utah, one case.

June 10th, Bon Marche, Seattle, Washington, one case.

June 10th, J. H. Bible Company, Lovelock, Nevada, two cases.

July 16th, Jevne & Company, Chicago, five cases.

July 19th, J. H. Bible Company, Lovelock, Nevada, four cases.

July 19th, C. H. Schaub & Company, Chicago, five cases.

July 26th, Bon Marche, Seattle, Washington, 10 cases.

July 29th, E. A. Dallegar, Austin, Minnesota, one case.

August 19th, Jaffa Grocery Company, Albuquerque, New Mexico, 10 cases.

[fol. 32] August 19th, Bon Marche, Seattle, 10 cases.

September 3d, John R. Walls, Tucson, Arizona, one case.

September 9th, Sixth Avenue Drug Company, Tucson, Arizona, 12 cans.

September 27th, Cash Grocery, Idaho Falls, two cases.

September 30th, George G. Starkey, Austin, Minnesota, six cans.

September 30th, Frederick L. Smith, Austin, Illinois, six cans.

October 17th, Miller-Hohl Drug Company, Pueblo, Colorado, one case.

October 24th, Gunning Drug Company, Longworth, Colorado, one case.

November 1st, Bon Marche, Seattle, 15 cases.

November 1st, J. S. Bryan Mercantile Company, Denver, Colorado, five cases.

November 1st, Funco Pharmacy, Minneapolis, one-half case.

November 17th, J. S. Bryan Mercantile Company, Denver, 10 cases.

November 20th, Miller Hohl Drug Company, Pueblo, two cases.

December 1st, Thomas M. Fox, Milwaukee, 10 cases.

Mrs. Marsh, I will ask you, if as to each one of those entries, the order was received, and the goods shipped, and paid for?

A. 88. Yes.

Q. 89. Now, Mrs. Marsh, I will ask you subsequent to the date of your last testimony as to sales, do you or your own knowledge

know whether sales were from time to time made to persons outside of the State of California, of the products of the California Breakfast Food Company?

[fol. 33] A. 89. Yes.

Q. 90. And that continued from the time when you last testified about, on up to the present time from time to time when such orders were received and shipped?

A. 90. Yes.

Q. 91. I hand you herewith a carton reading at the top, "Cereal, California Laxative Fig-Nuts," printed in orange colored ink, and ask you whether or not you know whether that was ever used by the California Breakfast Food Company or the California Fig-Nut Company as a carton for the sale of their fig-nuts?

A. 91. Yes, sir, this is the package.

Q. 92. Do you recall when that particular package first came into use?

A. 92. 1907, I think.

Mr. Stick: The carton identified by the witness is offered in evidence as Registrant's Exhibit 1.

(The said carton is thereupon marked "Registrant's Exhibit No. 1" and the same is returned with these depositions.)

Q. 93. Referring to Registrant's Exhibit No. 1, do you know how long that package was used?

A. 93. We used those one year, I know that.

Q. 94. May it have been longer than that?

A. 94. Two years, I think. And then we changed to this. There was more orange on it.

Q. 95. Then the California Laxative Fig-Nuts was sold in this package for a period of a year or more beginning in 1917?

A. 95. Yes.

Q. 96. I hand you what purports to be a carton and ask you if you can identify that?

A. 96. Yes, sir.

Q. 97. What is that?

[fol. 34] A. 97. California Fig-Nut Laxative.

Mr. Stick: I will offer this in evidence as Registrant's Exhibit No. 2.

(The said carton is thereupon marked "Registrant's Exhibit No. 2" and the same is returned with these depositions.)

Q. 98. Referring to Registrant's Exhibit No. 2, was this carton or package used in the sale of the California Laxative Fig-Nuts?

A. 98. Yes.

Q. 99. Registrant's Exhibit No. 2 was used following the abandonment of Registrant's Exhibit No. 1?

A. 99. Yes, sir.

Q. 100. And it was continued in use until when?

A. 100. We used that for about three years.

Q. 101. Now, I hand you another carton and ask you if you can identify that?
A. 101. Yes.
Q. 102. What is that?
A. 102. That is the California Laxative Fig-Nut.

Mr. Stick: I will ask to have this marked as Registrant's Exhibit No. 3.

(The said carton is thereupon marked "Registrant's Exhibit No. 3" and the same is returned with these depositions.)

Q. 103. I will ask you whether Registrant's Exhibit No. 3 was used for the sale of California Laxative Fig-Nuts?
A. 103. Yes, sir.
Q. 104. And it followed in use immediately after the abandonment of Exhibit No. 2?
A. 104. Yes.
Q. 105. Do you know how long this was used?
A. 105. We used this about a year.
Q. 106. I show you another carton and ask you whether that is [fol. 35] another of the cartons used by the California Breakfast Food Company, or the California Fig-Nut Company?
A. 106. Yes, sir.
Q. 107. Do you know what period of time that was used?
A. 107. That was from March 17, 1917, to July 20, 1920.

Mr. Stick: I will ask to have this marked as Registrant's Exhibit No. 4.

(The said carton is thereupon marked "Registrant's Exhibit No. 4" and the same is returned with these depositions.)

Q. 108. I show you another carton and ask you whether this is one of the cartons that was used by the California Fig-Nut Company?
A. 108. Yes, sir.
Q. 109. When was that adopted?
A. 109. July, 1920.
Q. 110. And is still in use?
A. 110. Yes, sir.

Mr. Stick: I will ask that that be marked Registrant's Exhibit No. 5.

(The carton is thereupon marked "Registrant's Exhibit No. 5" and the same is returned with these depositions.)

Q. 111. Since July, 1920, have you used this Registrant's Exhibit No. 5 exclusively as a carton for the products of the California Fig-Nut Company?
A. 111. For the fig-nuts, yes.
Q. 112. Did they manufacture another product during that time?
A. 112. Yes, sir.
Q. 113. What was that?
A. 113. Fig-Nuts Agar.

[fol. 36] Q. 114. Were the Fig-Nuts Agar sold in the same carton as Registrant's Exhibit No. 5?

A. 114. No.

Q. 115. Mrs. Marsh, looking at the five exhibits now before you, on the part of registrants, were they all of the cartons that were used by the California Breakfast Food Company or California Fig-Nut Company?

A. 115. No.

Q. 116. I show you what purports to be a panel of a carton and ask you if you can identify that?

A. 116. Yes.

Q. 117. What is that?

A. 117. California Fig-Nut Cereal.

Q. 118. And was that the panel of the carton that was used by the California Breakfast Food Company at one time, in the sale of their product?

A. 118. Yes.

Mr. Stick: I will offer this and ask that it be marked as Registrant's Exhibit No. 6.

(The panel is thereupon marked "Registrant's Exhibit No. 6" and the same is returned with these depositions.)

Q. 119. Was this package of which Registrant's Exhibit No. 6 is a panel, used in the sale of the products of the California Breakfast Food Company? By the way, let me ask you first, was this after or before any of Exhibits 1, 2, 3, 4 or 5?

A. 119. It was before, yes, sir.

Q. 120. Are you able to produce one of the complete cartons, of which Exhibit No. 6 is a part or panel?

A. 120. No.

Q. 121. Is this Exhibit No. 6 the first package or carton that was used by the California Breakfast Food Company?

[fol. 37] A. 121. No.

Q. 122. There was a package or carton prior to that, yet?

A. 122. Yes.

Q. 123. Have you a copy or one of the cartons that were used prior to Exhibit No. 6?

A. 123. No, I have not.

Q. 124. Can you describe it?

A. 124. Yes.

Q. 125. State as near as you can what it consisted of?

A. 125. California Fig-Nuts Laxative.

Q. 126. In what colors was it printed?

A. 126. Black.

Q. 127. Was it similar in design to Registrant's Exhibit No. 1?

A. 127. Same—it was similar in size, and it was like this, number 1, only in black lettering, without the "Cereal."

Q. 128. I now show you carton used by the California Breakfast Food Company, which has been handed to me by Mr. Lyon, and

ask you if you can identify that as one of the cartons used by the California Breakfast Food Company?

A. 128. Yes, sir.

Q. 129. Do you know when that was used?

A. 129. It was used in 1915.

Q. 130. When with reference to Exhibits 1 to 6, can you tell about what time it was used, between what times, or between what exhibits?

A. 130. This was our first package, De Luxe. When we had our first package of laxative, it was like this, only in black. And that is the one we haven't got.

Mr. Lyon: In other words, the first package of Cereal was like this [fol. 38] last carton that I have produced, except that the carton I have produced carries the term "De Luxe"?

A. Yes, instead of "Laxative."

Mr. Stick: We offer this as Registrant's Exhibit No. 7.

(The carton is thereupon marked "Registrant's Exhibit No. 7" and the same is returned with these depositions.)

Mr. Stick: The carton is now returned to Mr. Lyon, to be filed in connection with the previous stipulation.

Q. 131. When the company moved to Orange they began to manufacture the product known as California Fig-Nuts Agar?

A. 131. Yes.

Q. 132. Have you in your possession a copy of the carton or label on the carton as used in the sale of California Fig-Nuts Agar?

A. 132. No.

Q. 133. Was the Agar product manufactured before you went to Orange?

A. 133. Yes.

Q. 134. Have you a copy of the carton or the label on the carton of the first packages of the California Fig-Nuts Agar?

A. 134. No. It is the same as that, only black.

Q. 135. It was printed in black?

A. 135. Yes, black instead of orange.

Q. 136. On white paper?

A. 137. Yes, black letters.

Q. 138. Do you know when that was first used?

A. 138. August, 1915, according to the records of the company.

Q. 139. August, 1915, the product known as California Fig-Nuts was first made?

A. 139. Yes.

[fol. 39] Q. 140. I show you a label "Cereal, California Fig-Nuts Agar, DeLuxe," in orange and ask you if you can identify that?

A. 140. Yes.

Q. 141. What was that?

A. 141. California Fig-Nuts Agar.

Q. 142. That is the label or wrapper for the California Fig-Nuts Agar?

A. 142. Yes.

Q. 143. And that was the first one used at Orange?
A. 143. This was the first one we used in Orange.
Q. 144. When you went to Orange you abandoned the black label you had been using for the Agar in Los Angeles?
A. 144. Yes, sir.
Q. 145. And this one you have in your hand came into use when you first went to Orange?
A. 145. Yes.

Mr. Stick: I will offer this and ask that it be marked as Registrant's Exhibit No. 8.

(The label is thereupon marked "Registrant's Exhibit No. 8" and the same is returned with these depositions.)

Q. 146. I now hand you four other labels for containers of the California Fig-Nuts Agar, and ask you if those four were used as labels of the cartons or containers in which the Agar was sold?
A. 146. Yes, sir.
Q. 147. And the order in which they appear here now, and in which they will be marked, Exhibits 9, 10, 11 and 12, are the order in which they were used?
A. 147. Yes, sir.

Mr. Stick: I ask that these be marked in order as Registrant's Exhibits 9, 10, 11 and 12.

[fol. 40] (The labels are thereupon marked "Registrant's Exhibits Nos. 9, 10, 11 and 12" and the same are returned with these depositions.)
Mr. Lyon: I will ask you when you adopted No. 12?
The Witness: According to the records of the company No. 12 was adopted in about March, 1920.

Q. 148. I will ask you, Mrs. March, to examine the documents I now hand you, and state whether or not they are literature, pamphlets or circulars used from time to time by the California Breakfast Food Company or the California Fig-Nut Company?
A. 148. Yes, sir.

Mr. Stick: I will ask that these be marked as Registrant's Exhibit No. 13.
(The documents last above referred to, consisting of seven sheets or parts, marked "Registrant's Exhibit No. 13" and the same are returned with these depositions.)

Q. 149. I show a miniature package or carton and ask you if you can identify that as one of the sample or miniature packages that were distributed by the California Breakfast Food Company or California Fig-Nut Company?
A. 149. Yes.
Q. 150. Do you konw when that was in use?
A. 150. It was one of the first we had.

Q. 151. And subsequent thereto you have from time to time used packages of a similar character?
A. 151. Yes.

Mr. Stick: I will ask that this be marked as Registrant's Exhibit No. 14.
(The package is thereupon marked "Registrant's Exhibit No. 14" and the same is returned with these depositions.)

Q. 152. I show you what purports to be a recipe book and ask you if you can identify that?
[fol. 41] A. 152. Yes, sir.
Q. 153. Was that used or gotten up by the California Breakfast Food Company or the California Fig-Nut Company?
A. 153. California Fig-Nut Company.
Q. 154. And distributed among the customers of the company?
A. 154. Yes, sir.
Q. 155. Were those handed out by you at times of your demonstrations?
A. 155. Yes, sir.
Q. 156. Do you know whether they were mailed to the customers or prospective customers?
A. 157. No, we did not mail them. They were given out at my table in demonstrating.

Mr. Stick: I will ask that this be marked as Registrant's Exhibit No. 15.
(The recipe book is thereupon marked "Registrant's Exhibit No. 15" and is returned with these depositions.)
Q. 158. I hand you a little circular or folder and ask you if you can identify that?
A. 159. Yes, sir.
Q. 160. What is that?
A. 160. That is a circular for Fig-Nuts Agar.
Q. 161. That was gotten out and used by the California Breakfast Food Company or California Fig-Nut Company?
A. 161. California Fig-Nut Company.
Q. 162. And distributed through your demonstrations and otherwise?
A. 162. Yes, sir.
Mr. Stick: I will ask that this be marked as Registrant's Exhibit No. 16.

[fol. 42] (The circular is thereupon marked "Registrant's Exhibit No. 16" and is returned with these depositions.)

Q. 163. I show you another circular reading "Recipes of a Famous Chef" and ask you if you can identify that?
A. 163. Yes, sir.
Q. 164. What is that?
A. 164. Recipe book.
Q. 165. Was that ever used or gotten out by the California Breakfast Food Company or California Fig-Nut Company?

A. 165. California Fig-Nut Company.

Q. 166. And distributed among the customers and at the demonstrations and sales?

A. 166. Yes.

Mr. Stick: I will ask that this be marked as Registrant's Exhibit No. 17.

(The recipe book is thereupon marked "Registrant's Exhibit No 17" and is returned with these depositions.)

Q. 167. Exhibits 16 and 17 which you have identified are the last circular matter gotten out by the company.

A. 167. Yes.

Mr. Stick: Take the witness.

Cross-examination by Frederick S. Lyon, Esq., representing Postum Cereal Company, Incorporated:

Cross-question 1. Are you personally acquainted with the manufacture of the fig-nut products by the California Fig-Nut Company?

Answer 1. Yes, sir.

X Q. 2. In what manner have you become familiar with such manufacture?

A. 2. I have been with it since it started, helped make it, and manufactured it myself. In fact I made the first batch of Fig-Nuts Agar that was ever made, myself personally.

[fol. 43] X Q. 3. Was the Fig-Nuts Agar the first product?

A. 3. No. Fig-Nuts was the first product. That was made in the kitchen where I lived.

X Q. 4. I believe you stated that such breakfast cereal was composed of whole wheat flour, bran, malt, figs and nuts?

A. 4. Yes, sir.

X Q. 5. Can you give the proportions of these various i-gredients used in such cereal products?

A. 5. Well, we have the formula, but I can't give it off hand, from memory. We started in a small way, and made small quantities of it at first.

Mr. Lyon: We request that the formula referred to by Mrs. L. G. Marsh, the witness be produced:

Mr. Stick: The formula of the California Fig-Nuts products is a trade secret, to the revelation of which in this matter I object. Not as to the contents, but as to the percentage.

(Thereupon ensued a discussion, in which it was agreed that the attorneys for the respective parties would wire their eastern representatives for instructions on the above matter.)

Mr. Stick: Can we stipulate as to the organization of the company?

Mr. Lyon: Sure. Articles of incorporation, certificate of incorporation, decree of change of name, and so forth, having been produced and inspected by counsel represnting Posetum Cereal Company, Inc., it is hereby stipulated and agreed that the California Breakfast Food Company was incorporated as a private corporation

under the laws of the State of California on May 6, 1914, with its principal place of business at Los Angeles, California. That in ac-
[fol. 44] cordance with due proceedings had and in accordance with the laws of the State of California, by decree of the Superior Court of the State of California, in and for the County of Los Angeles, which court had jurisdiction thereof under the laws of the State of California, the name of said California Breakfast Food Company was changed to California Fig-Nut Company, on June 6, 1917, such decree being recorded as required by law in the office of the Secretary of State of the State of California, on or about July 17, 1917.

That the principal place of business of said corporation was on June 7, 1917, by due proceedings had according to the laws of the State of California, changed to the City of Orange, Orange County, State of California, which City of Orange is approximately thirty-five miles from the City of Los Angeles.

(At this point, the hour of 12 o'clock noon having arrived, an adjournment is taken until tomorrow, June 4, 1921, at 9 o'clock a. m.)

Mrs. L. G. Marsh.

Los Angeles, California—9:00 o'clock a. m. June 4, 1921.

This being the time to which the further taking of the depositions on behalf of California Fig-Nut Company was continued, proceedings are now resumed.

Present: John C. Stick, Esq., representing Arthur E. Wallace, Esq.; and Frederick S. Lyon, Esq., representing Frank S. Reed, Esq., and Edward W. Rogers, Esq.

ALEX CREE, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by John C. Stick, Esq., counsel for California Fig-Nut Company, as follows, to wit:

Question 1. What is your name?

Answer 1. Alex Cree.

[fol. 45] Q. 2. What is your age?

A. 2. About thirty-six.

Q. 3. And your occupation?

A. 3. Grocery clerk.

Q. 4. And your residence?

A. 4. 5008 Fifth avenue, Los Angeles.

Q. 5. How long have you been a grocery clerk?

A. 5. Since 1898.

Q. 6. Continuously?

A. 6. Yes.

Q 7. Where have you worked the last five years?

A. 7. The last five years I was in the Canadian Army. I was not working anywhere since 1918.

Q. 8. Until when?

A. 8. I went with Seelig in 1919.

Q. 9. Do you remember what part of the year 1919?

A. 9. I went there in May, 1919, about the fourteenth.

Q. 10. How long did you continue working for him?

A. 10. Up until the 31st of August of the same year.

Q. 11. Then where did you begin to work?

A. 11. I did not work anywhere except at 5015 Vermont Street; I worked up there for myself shirtmaking and helping my wife dressmaking, owing to my poor health.

Q. 12. When did you go back after you left Seelig, to working in a grocery store?

A. 12. May, 1920, I went back to Cohn.

Q. 13. Have you continued to work there ever since?

A. 13. Yes, sir.

Q. 14. Are you familiar with the products commonly sold in grocery stores as Grape-Nuts?

A. 14. Yes, sir.

Q. 15. How long have you been selling Grape-Nuts?

[fol. 46] A. 15. I sold them all the time I was in that business. My recollection runs back until about 1906.

Q. 16. Do you recall where you first became acquainted with the product known as grape-nuts?

A. 16. Yes, sir.

Q. 17. Where?

A. 17. James A. Kelley's, 1921 Ballymagee, Bangor County, Ireland. I served six and a half years there.

Q. 18. Do you recall about when it was that you first became acquainted with grape-nuts at this place?

A. 18. We handled them there all that time.

Q. 19. Do you recall when it was you began work there?

A. 19. I went with Mr. Kelley on the third of August, 1900. I was working in another store before that.

Q. 20. Are you familiar with the product known as California Fig-Nuts?

A. 20. Yes, sir.

Q. 21. Where did you first become acquainted with that product?

A. 21. I think it was T. Eaton & Company, Toronto. That was before 1914. I was there from 1906 to 1914, with the T. Eaton Company.

Q. 22. And it was there that you first became acquainted with California Fig-Nuts?

A. 22. To the best of my knowledge.

Q. 23. Have you been acquainted with that product as it has been sold and manufactured since that time?

A. 23. Fig-Nuts? Well, I did not take very much interest in it

Q. 24. But you were acquainted with the product?

Mr. Lyon: Objected to as leading and suggestive.

A. 24. Yes.

Q. 25. Did you handle fig-nuts in Mr. Cohn's store?

[fol. 47] A. 25. Yes, sir.

Q. 26. Ever since you have been working there?

A. 26. Yes, sir.

Q. 27. Has there ever been a time since you have been working in Mr. Cohn's grocery store in Los Angeles when there has been any confusion whatsoever in your mind between the cartons in which Grape-Nuts and California Fig-Nuts are packed and sold?

Mr. Lyon: Objected to as leading and suggestive, and incompetent, calling for the conclusion of the witness, and not a statement of facts. Not the proper method of proof; not the best evidence.

A. 27. No.

Q. 28. Has there ever been a time since you worked in Mr. Cohn's grocery store when there has been any confusion in your mind between the trade-marks or trade-names of the product known as grape-nuts and the product known as California Fig-Nuts?

Mr. Lyon: Same objection as noted to the preceding question.

A. 28. No, sir.

Q. 29. From your familiarity with the product known as Grape-Nuts, as you have testified to it, what impression was made upon your mind by the literature or the reading on the carton or the trade-mark or trade-name Grape-Nuts relative to the ingredients used in its manufacture?

Mr. Lyon: Same objection as last noted.

A. 29. I looked for grapes and nuts in some kind of form, but I did not get it.

Q. 30. What impression was made upon your mind from the reading of the literature on the carton or package, or trade-mark or name, California Fig-Nuts, relative to the ingredients which it contained?

Mr. Lyon: Same objection.

A. 30. I expected to get figs and nuts.

[fol. 48] Q. 31. Do you know a man by the name of Sweeney?

A. 31. No, sir.

Mr. Stick: Mr. Lyon, have you those two sales tags, thirty-four and thirty-five?

Mr. Lyon: Yes.

Mr. Stick: May I see them for identification, please? They have been introduced in evidence, have they not?

Mr. Lyon: I believe it was the understanding of both parties that they are in evidence. Is that your understanding?

Mr. Stick: My understanding is that they are in evidence, and the copies that have been sent to me are marked Exhibit R-2 and Exhibit R-1.

Mr. Lyon: Under the understanding stated that they are and have been received in evidence, you are entitled to see them. I am relying upon such assertion upon the part of the California Fig-Nut Company, that they are in evidence, in so handing them to you.

Q. 32. What do you call these things?

A. 32. Those are sales checks or sales slips.

Q. 33. I hand you now sales slip from Albert Cohn's grocery store—printed on the top—bearing the mark Exhibit R-1, Edna M. Facler, Notary Public, and so forth, and another—apparently original and carbon—same kind of a sales slip, marked Exhibit R-2, Edna M. Facler, a Notary Public, and ask you if you ever saw those before?

A. 33. Yes, sir.

Q. 34. Where did you see them?

A. 34. At Albert Cohn's store, when I wrote them out.

Q. 35. Does Mr. Albert Cohn have more than one store?

A. 35. Yes, sir three stores.

Q. 36. At which of the three stores was it that you saw them?

A. 36. The Main street store, No. 1.

[fol. 49] Q. 37. When did you see that one?

Mr. Lyon: Object to that on the ground that the witness has in his hand the sales slips referred to, and he has not been examined as to any independent recollection in regard to the matters inquired about without placing before him the entire exhibits.

A. 37. I don't recall the date or day, but I can tell you almost the hour in the evening.

Q. 38. Can you by an examination of those documents determine the date upon which you saw them?

A. 38. It is on here, sir, yes.

Q. 39. What date, after refreshing your recollection by looking at the documents, would you say you saw them?

A. 39. On that date, January 29, 1921.

Q. 40. Do you recall who was present at that time that you saw them?

A. 40. Yes, sir.

Q. 41. Who?

A. 41. The man that made the purchase of the grape-nuts and fig-nuts.

Q. 42. And who else?

Mr. Lyon: Objected to as leading and suggestive.

A. 43. Ross, the man that I checked the orders with.

Q. 44. And who else?

A. 44. Myself.

Q. 45. In whose handwriting are those checks or sales slips?

A. 45. My own handwriting.

Q. 46. Are they all three of them originals, or are some of them carbons?

A. 46. Two originals and one carbon copy.

Q. 47. Will you point out which of the three is a carbon copy?

A. 47. This is a carbon in my left hand.

[fol. 50] Q. 48. Referring to the one marked Exhibit 2, Edna M. Facler, Notary Public, and so forth?

A. 48. Yes, sir.

Q. 49. Will you state the circumstances under which those sales slips were made?

A. 49. Yes, sir, I can do so.

Q. 50. Do so, please.

A. 50. This gentleman came in and asked me for a package of fig-nuts, and I looked around, and went and got the step ladder and got the fig-nuts, as we always do, and put them down on the top of the counter, I remember just where it was, and wrote out this check here—this is the carbon copy—and when I got this far down he says, "Oh, I want the other." He changed his mind to fig-nuts.

Mr. Stick: I was interrupted for a moment. Will you read the answer as far as given?

(Answer read.)

Q. 51. Is that a fact, Mr. Cree?

A. 51. Yes, sir. When he asked me to change this check, I took the man to be a pure food inspector, so thinking he was that I was not going to have a duplicate go from Albert Cohn's store all rubbed over and erased, for the Government. That was my idea in tearing off the check and issuing a new check, so as not to have a rough and blurred check leave the store.

Q. 52. You stated in your last answer that he asked for a package of grape-nuts?

A. 52. No, sir.

Mr. Lyon: Object to that as leading and suggestive, and an evident attempt to impeach the testimony of the witness.

Q. 53. I believe you stated in your direct testimony that the man came in and asked you for a package of fig-nuts, and that you went [fol. 51] and got the fig-nuts and then made out the slip, the carbon copy of which is marked Exhibit R-2. Is that statement correct?

A. 53. No, sir.

Q. 54. What was the fact, if that statement is not correct?

A. 54. He came in and asked for grape-nuts and I got the grape-nuts.

Mr. Lyon: Note the same objection to that question.

Q. 55. When you said fig-nuts a moment ago, did you mean grape-nus?

Mr. Lyon: Same objection.

A. 55. I don't think I did say it.

Q. 56. I asked you the question and you said fig-nuts, as the reporter has it. Did you mean fig-nuts or grape-nuts?

Mr. Lyon: Same objection.

A. 56. Grape-nuts.

Q. 57. Now, go ahead and relate the circumstances.

A. 57. I got them down and put them down on the top of the counter, and got my order book, as he wanted a duplicate check, and

I write in his name, and he gives me his address, and I said, "I don't have to put that down as you are going to take it with you." And then I wrote, "One package grape-nuts," and the man was standing there looking up on the shelf, and he said, "I will take a package of the other, fig-nuts." So naturally enough I said "All right, we will easy fix that up." That was the very words I said to him. And I tore out this other check, and I took the package of grape-nuts off the counter and put it back, and got the other, while Ross checked the order.

Q. 58. Then what did you do?

A. 58. Then I gave it to the cashier.

[fol. 52] Q. 59. What was the next thing you did?

A. 59. I gave him the package, and the other check, marked Paid.

Q. 60. Referring now to the exhibit or document marked Exhibit R-1?

A. 60. Yes.

Mr. Stick: Take the witness.

Cross-examination by Frederick S. Lyon, Esq., representing Postum Cereal Company, Inc.:

Cross-question 1. With whom have you talked concerning the matter before giving your testimony here today?

Answer 1. This is the first time I ever went over it.

X Q. 2. Before giving your testimony you talked with nobody about it?

A. 2. Well, Mr. Cohn asked me about it, but I never told him how the thing happened, or what about it. He called me to the office and told me I gave out a packet of fig-nuts for grape-nuts, and I told Mr. Cohn I could not make such an error as that. If he got fig-nuts he must have asked me for fig-nuts.

X Q. 3. After talking with Mr. Cohn, who else did you talk with concerning this, before testifying today?

A. 3. Well, I don't know the gentleman, but he was a gentleman that called at Albert Cohn's store and told me he wanted me to get off as a witness, and I said that if Mr. Cohn didn't object to me getting off I did not object to appearing.

X Q. 4. What kind of a looking man was he?

A. 4. That is him right over there.

X Q. 5. Oh, you mean Mr. Zeiss, the general manager of the California Fig-Nut Company, who is present in the room here?

[fol. 53] A. 5. Yes, sir.

X Q. 6. Who else have you talked with in regard to this circumstance before going on the stand to give your testimony this morning?

A. 6. I talked to Moore, one of the chaps who works with me.

X Q. 7. And who else?

A. 7. All the boys in the store, as they joked me about it, how I could give that out, and I said, "I never gave that out," that is all.

X Q. 8. And what else?

A. 8. That is all.

X Q. 9. Did not talk with Mr. Stick at all?

A. 9. He just told me that he had asked Mr. Cohn if I could get off. That he would like to have me called up here as a witness, and he asked me to get off, and if they had no objections he wanted to know if I would come.

X Q. 10. Did not tell you what he wanted you about?

A. 10. Mr. Cohn had told me before that I had given it out.

X Q. 11. But he did not tell you what it was he wanted you to testify about?

A. 11. In a case something about that I gave out that fig-nuts. This Ben Valley, who was the buyer, he told me he would let me off.

X Q. 12. Did you tell Mr. Stick you knew about this circumstance?

A. 12. I did not tell him anything pertaining to the sale, because at that time I had not got it all back to my mind.

X Q. 13. You worked in Mr. Cohn's store how long?

A. 13. Since May, 1920.

X Q. 14. And are still employed there?

A. 14. Yes, sir.

[fol. 54] X Q. 15. I don't suppose you sell many packages of grape-nuts during a day, do you?

A. 15. Oh, yes, a dozen or two dozen. If we get a shipping order we may get six packets. That helps out.

X Q. 16. You do not handle daily many packages of fig-nuts, do you?

A. 16. Yes, we handle quite a few of those, also.

X Q. 17. What was there about this particular occurrence that fixed it so vividly in your memory?

A. 17. In the first place, the asking for the check, because we don't make out a check for anything under five dollars, as a rule. That is the rule in the store, that anything under five dollars we don't make a check for, but this man asked me for a receipt, and therefore I took him for a United States Food Inspector, or something in that capacity, and I thought he wanted that to send through so he would get his money back. That was what made me notice it at that time.

X Q. 18. You state it is the custom in Albert Cohn's store not to make out a sales slip for any sum less than five dollars?

A. 18. Yes, or over. Anything over we make out a slip.

X Q. 19. Not for anything less?

A. 19. Yes, sir. That is what draws that back to me so well. If you ask for them they will give them to you.

X Q. 20. And a great many people do ask for them?

A. 20. No. They are in too big a hurry to get away.

X Q. 21. You seldom make out a sales slip?

A. 21. Very seldom.

X Q. 22. What kind of a looking man was this man that you made this sale to?

A. 22. He was about five feet—I would say about five feet seven, figuring he was about my height, but a little heavier set, and he wore a light gray overcoat.

[fol. 55] X Q. 23. Was he light or dark complected?
A. 23. You couldn't call him light?
X Q. 24. You couldn't call him light?
A. 24. No. But as far as I remember his skin was fair.
X Q. 25. Did he have a mustache?
A. 25. No, I don't think so.
X Q. 26. Beard of any kind?
A. 26. No, he had no beard. I know that.
X Q. 27. Sure of that?
A. 27. Sure of that part of it.
X Q. 28. Are you equally positive he did not have a mustache?
A. 28. I can't swear to that, but I remembered looking up at the guy, as I called him—or fish; the poor fish did not know what he was after. That was what I called him to the other fellow, Moore. "The poor fish didn't know what he was after."
X Q. 29. You say you would not be able to identify him if you saw him again?
A. 29. No, I would not say I could not.
X Q. 30. Would you say you could?
A. 30. If he had the same overcoat on, I guess I could.
X Q. 31. In other words, you could identify the overcoat?
A. 31. Pretty near.
X Q. 32. Otherwise you would not know the man at all, is that it?
A. 32. I can see him behind the counter, with the overcoat. And I looked at my salesmate and told him that was an easy job that guy had, just coming in and buying a package of something he wanted to eat, and then going home, and getting 17 cents from the Government.
X Q. 33. What kind of an overcoat was this?
[fol. 56] A. 33. Gray overcoat, sack back, as I call it.
X Q. 34. Long or short?
A. 34. About the knee. I remember him putting the packet in his pocket.
X Q. 35. What kind of a hat did he have on?
A. 35. It was a greenish kind of a hat.
X Q. 36. Do you remember whether it was a gray or black hat?
A. 36. It was dark. It was not a light hat. It was dark.
X Q. 37. Are you sure it was not a stiff hat?
A. 37. I see too many people to take them all in that way.
X Q. 38. What time of the day was this?
A. 38. In the evening.
X Q. 39. When you say in the evening, what do you mean by that?
A. 39. Along about four or half past four, between half past four and five.
X Q. 40. Was it dark?
A. 40. You can't call it dark in that store; the lights are on.
X Q. 41. The store was artificially lighted at that time?
A. 41. Always is just back where that thing happened. There is a big light over the cashier.

X Q. 42. Was it dark outside at that time, or was it daylight?

A. 42. I never looked out at that time to see. I don't know what it was like then. The lights were lit in the store at that time. A man that is hustling don't bother much about the outside. He wants to get the people out.

X Q. 43. You paid particular attention to this particular sale? [fol. 57] A. 43. Yes, I remember the sale quite well.

X Q. 44. When was it Mr. Cohn first talked to you in regard to this sale?

A. 44. The 18th of last month.

X Q. 45. May?

A. 45. Yes, sir. About 5 o'clock in the afternoon.

X Q. 46. Did he tell you at that time that there was litigation or a suit, anything of that kind?

A. 46. No. He sent for me to come to the office, and I thought he was going to pay me off, if they sold out that store, and I said to the man that came down and called me, "I may as well get my coat," and he said, "No, you are all right." So up I goes, and Mr. Cohn said, "Mr. Cree, we have a correspondence here that a man asked for a package of grape-nuts and you gave him a packet of fig-nuts." And I said, "No, sir, I did not." He said, "Are you positively sure?" I said, "Yes, sir. There is nobody could make a mistake like that, not even a blind man."

X Q. 47. You are sure that he first asked for a package of grape-nuts, are you?

A. 47. Yes, sir, positive. And I had the grape-nuts right down before I made out the check, and then I put it back after the man changed his mind.

X Q. 48. You are very positive that he did not ask for a package of fig-nuts first?

A. 48. No, sir; I am absolutely positive he asked me for grape-nuts, and I got him grape-nuts.

X Q. 49. As soon as you put the grape-nuts on the counter in front of him, did he tell you he wanted fig-nuts?

A. 49. No, sir; he asked me for the receipt first, and then I started to write the receipt, and when I got down part way he was standing looking up at the shelf, and he said, "I will take a packet of [fol. 58] fig-nuts," and I looked up at him, and I thought, "He is some poor fish that don't know what he wants. Food inspector." I said, "All right, we will very soon fix that." And he said, "The erased one will be all right." And I said, "No, it will have to go through the Government, and I don't want anything that is erased to go out," and I tore it out.

X Q. 50. Do you remember the man's name?

A. 50. No.

Mr. Lyon: That is all.

Alex Cree.

Mr. Stick: I will call Maud Wilson as a witness.

Mr. Lyon: Is this one of the witnesses named in the notice?

Mr. Stick: I think not. No, she is not named in the notice.

Mr. Lyon: Then I object to the taking of the deposition of this witness on the ground that no notice of the taking of the deposition of such new witness has been given.

Mr. Stick: If you insist upon that objection I will withdraw the witness, and call Mr. Zeiss.

W. J. Zeiss, being first duly sworn, in answer to interrogatories propounded by Mr. Stick, counsel for California Fig-Nut Company, deposeth and saith:

Question 1. What is your name?

Answer 1. W. J. Zeiss.

Q. 2. What is your age?

A. 2. Forty.

Q. 3. And your occupation?

A. 3. General manager of the California Fig-Nut Company.

Q. 4. What is your residence?

A. 4. 1645 South Oxford, Los Angeles.

Q. 5. How long have you been employed by the California Fig-Nut Company?

A. 5. March, 1920.

[fol. 59] Q. 6. And continuously since then?

A. 6. Yes, sir.

Q. 7. In the capacity of general manager all that time?

A. 7. Yes, sir.

Q. 8. Where is your office located?

A. 8. Orange, California, in the building of the factory.

Q. 9. Generally, what are your duties as general manager?

A. 9. The entire supervision of the manufacture and sale of the products, and administrative duties.

Q. 10. Are you acquainted with the ingredients that are used in the manufacture of fig-nuts?

A. 10. I am.

Q. 11. I will ask you to state what ingredients are used in the manufacture of the products of the California Fig-Nut Company?

Mr. Lyon: Objected to as incompetent, irrelevant and immaterial, no foundation laid; the witness not being shown to be qualified to answer the question.

A. 11. (No answer to last question.)

Q. 12. What experience have you had in the actual manufacture of California Fig-Nut products?

A. 12. The purchase of the ingredients used in the manufacture of the products, supervision of the manufacture, to the extent of seeing that the products purchased are placed in the finished products.

Q. 13. Are you present at the time of the mixing of the ingredients and the placing of them together?

A. 13. Yes, sir.

Q. 14. Are you familiar with the proportions of the different ingredients that are used in the manufacture?

A. 14. Yes.

Q. 15. I will ask you to state, then, what ingredients are used in [fol. 60] the manufacture of the product known as California Fig-Nuts?

A. 15. Graham flour, figs——

Q. 16. May I add to this question, together with the percentage or proportion of each that is used? That will save going over the same thing twice.

A. 16. I haven't figured out the percentages.

Q. 17. Can you give the pounds?

A. 17. Yes.

Q. 18. All right, do so.

A. 18. Six barrels of flour. That, here in California, is 136 pounds to the barrel, or 1,176 pounds, isn't it? Wait a minute. I think I have that figured out here somewhere. Cut that out and I will start over again. Is that all right?

Mr. Lyon: Sure; any way you want to.

A. 18. (Continuing:)

Flour	496 pounds—	79 per cent.
Bran	80 pounds—	13 per cent.
Figs	15 pounds—	2.5 per cent.
Malt	8 pounds—	1.5 per cent.
Peanuts	12 pounds—	2 per cent.

Q. 19. Are those all the ingredients that are used in the manufacture of that product?

A. 19. No; we use yeast and salt.

Q. 20. In what proportions?

A. 20. Salt 5 pounds, 1 per cent; yeast 5 pounds, 1 per cent.

Q. 21. Is there anything else used in the product?

A. 21. Water.

Q. 22. Mr. Zeiss, are you familiar with the sales made by the company since you have been general manager?

A. 22. I am, sir.

Q. 23. During the period since you have been general manager, [fol. 61] have there been sales of California fig-nuts to parties outside of the State of California?

A. 23. Yes, sir.

Q. 24. Shipments in pursuance to orders so received?

A. 24. Yes, sir.

Q. 25. Have there been more than half a dozen?

A. 25. Oh, yes.

Q. 26. Many?

A. 26. Quite a few.

Q. 27. Mr. Zeiss, how long have you been acquainted with the product known as grape-nuts?

A. 27. Quite a few years.
Q. 28. You have purchased it in the stores?
A. 28. Yes, sir.
Q. 29. And used it in your home?
A. 29. Yes.
Q. 30. Are you familiar with the carton and package containing it?
A. 30. I am.
Q. 31. Familiar with the advertising of the Grape-Nuts people?
A. 31. Yes, sir.
Q. 32. And with the trade-mark or trade name of Grape-Nuts as used on the package?
A. 32. Yes, sir.
Q. 33. What impression was created upon your mind by the literature you read or the carton and the printing thereon, in which it is sold, or the trade-mark or trade name of Grape-Nuts, relative to the ingredients which are or were used in the manufacture thereof?
Mr. Lyon: Objected to as incompetent, irrelevant and immaterial.
A. 33. My first impression when I saw the package of grape-nuts was that there would be in the contents something pertaining to grapes and nuts.
[fol. 62] Q. 34. How long have you been familiar with the product known as California Fig-Nuts?
A. 34. Since my connection with the company.
Q. 35. Did you know it before then?
A. 35. Of it, but not the product.
Q. 36. Has the name California Fig-Nuts been used by your company since you have been general manager in the sale of your product?
A. 36. Yes, sir.
Q. 37. During all of that period of time?
A. 37. It has.

Mr. Stick: Take the witness.

In answer to cross-interrogatories propounded to the witness by Frederick S. Lyon, Esq., counsel for Postum Cereal Company, Inc., he sayeth:

Cross-question 1. You state you are now general manager of the California Fig-Nut Company?
Answer 1. Yes, sir.
X Q. 2. Are you also a stockholder in that company?
A. 2. Yes, sir.
X Q. 3. You have given the percentage of the ingredients which you state said California Fig-Nut Company now incorporates in its so-called fig-nuts product, consisting of flour 490 pounds, bran 80 pounds, figs 15 pounds, malt 8 pounds, peanuts 12 pounds, yeast 5 pounds, salt 5 pounds. How many packages or pounds of such fig-nuts product is produced by such a batch?

A. 3. This will produce approximately 110 ten and a quarter pound raw loaves.

X Q. 4. What you mean by raw?

A. 4. Unbaked.

X Q. 5. And baked how many?

A. 5. Same number.

[fol. 63] X Q. 6. Or in other words what would be the entire bulk weight of such a batch?

A. 6. Ten times that. What would that be? I would have to figure that to make it exact. On hundred and ten times ten is eleven hundred pounds, and then one-quarter—about eleven hundred and twenty-three pounds.

X Q. 7. I am afraid, Mr. Zeiss, that your figures are wrong, or that you have misunderstood my question. You have given us six hundred and fifteen pounds of ingredients. Then the additional weight of the product is water?

A. 7. Yes, sir.

X Q. 8. Where do you purchase the figs to which you have referred?

A. 8. The name of the firm?

X Q. 9. Yes.

A. 9. We have been purchasing recently from the Carque Pure Food Company of Los Angeles.

X Q. 10. Those are the dried figs of commerce?

A. 10. They are, sir.

X Q. 11. And the peanuts you refer to are shelled peanuts?

A. 11. Yes, sir.

Mr. Lyon: That is all.

Mr. Stick: I produce label copyright certificate No. 20663, issued by the United States Patent Office on June 18, 1918, for a label the title of which is "California Fig-Nuts DeLuxe" (for a food compound).

Mr. Lyon: I understand that it is your desire to offer in evidence this label copyright certificate, and the label attached, and I will stipulate with you that a photostat copy of the certificate itself and the photostat copy of the label may be offered in evidence with the same force and effect as the original, the stipulation being that such [fol. 64] copy shall have the same force and effect as though the original were offered; but the copy and original are objected to as incompetent, irrelevant and immaterial.

It being understood and stipulated that such label was printed in the same color as Registrant's Exhibit No. 2.

Mr. Stick: That is satisfactory. So stipulated. I now offer in evidence certificate of claim to trademark issued by the Secretary of State of the State of California, and request that you stipulate that the Notary may copy such certificate in the record, with the same force and effect as the original?

Mr. Lyon: That is satisfactory. The Notary may copy such certificate in the record with the same force and effect as the original, but which original and copy are objected to as incompetent, irrelevant

and immaterial; this objection having no more effect against the copy than against the original.

It is stipulated and agreed that all exhibits offered in evidence shall be delivered by the Notary to the counsel for the party offering same, to be retained in the custody of counsel until all of the depositions in the case have been completed, and to be subject to inspection by opposing counsel during all usual business hours, and produced if required at any taking of depositions of witnesses on behalf of either party.

Mr. Stick: That is satisfactory.

Mr. Lyon: I will now consent that an adjournment may now be taken until Tuesday morning at 11 o'clock, to meet at the same place, but consent to such adjournment by counsel for the Postum Cereal Company, Inc., is not to be construed to extend the right of the California Fig-Nut Company to take the depositions of witnesses not named in the notice heretofore given, as present counsel for the Postum Cereal Company, Inc., has no authority to stipulate in regard to that.

At this hour, 11 o'clock a. m., an adjournment is taken until Tuesday, June 7, 1921, at 11 o'clock a. m.

W. J. Zeiss.

Los Angeles, California—11:00 o'clock a. m., June 7, 1921.

[fol. 65] This being the time to which the further taking of the depositions on behalf of California Fig-Nut Company was continued, proceedings are now resumed.

Present: N. P. Moerdyke, Esq., representing Arthur E. Wallace, Esq.; and Frederick S. Lyon, Esq., representing Frank S. Reed, Esq., and Edward W. Rogers, Esq.

A. A. Hunt, being duly sworn, doth depose and say, in answer to interrogatories propounded to him by N. P. Moerdyke, Esq., counsel for California Fig-Nut Company, as follows, to wit:

Question 1. Will you state your name?
Answer 1. A. A. Hunt.
Q. 2. And age?
A. 2. Fifty-seven.
Q. 3. And your place of residence?
A. 3. 351 South Serrano.
Q. 4. How long have you resided there?
A. 4. About seven years.
Q. 5. What is your occupation?
A. 5. I am retired right now.
Q. 6. What was your former occupation?
A. 6. Wholesale grocer.
Q. 7. Where were you engaged in that business?
A. 7. Texarkana and Fort Worth and California.
Q. 8. How long?

A. 8. At least twenty-five years, to the best of my knowledge.

Q. 9. All that time were you engaged in the wholesale grocery business?

[fol. 66] A. 9. Yes, sir.

Q. 10. Was that business of a considerable size?

A. 10. Yes, sir.

Q. 11. What average annual business did you do to the best of your recollection?

A. 11. Differed widely. In Texarkana I suppose about a million dollars a year gross business. In Fort Worth, two millions or more. Los Angeles, from three million to four and a half million per year. That is to the best of my knowledge.

Q. 12. During that time, did you ever sell and handle the product known as grape-nuts?

A. 12. Yes, sir.

Q. 13. Did you ever purchase the product known as grape-nuts for your own personal use?

A. 13. Yes.

Q. 14. Did you ever use the product known as grape-nuts personally?

A. 14. Yes, sir.

Q. 15. During that period of time did you see and become familiar with the cartons in common use for the sale of grape-nuts?

A. 15. After making my first purchase.

Q. 16. Did you see and become familiar with the advertising literature issued to the trade and to the public by the company manufacturing and selling grape-nuts?

A. 16. Yes, sir.

Q. 17. Will you state what impression was created on your mind as to the ingredients contained in grape-nuts by the cartons referred to and the advertising literature referred to and by your own personal use of the products?

Mr. Lyon: Objected to as irrelevant and immaterial.

[fol. 67] A. 17. My first purchase of it, when the package was shown to me, after seeing the advertising, I was under the impression that it was grapes and something else, but just what that was I did not know until after the representative explained it to me and showed me the package, and I then knew the contents of the package was composed of wheat and barley.

Q. 18. State whether or not until this personal explanation was made by the representative of the company marketing grape-nuts the impression existed in your mind, derived from the cartons and advertising literature, that the product contained some portion of grapes and some portion of nuts?

Mr. Lyon: Objected to as leading and suggestive, and incompetent, irrelevant and immaterial.

A. 18. I was under that impression.

Q. 19. During the course of your business experience, did you

ever become familiar with the product known as California Fig-Nuts?

A. 19. Yes, sir.

Q. 20. Did you see and become familiar with the carton in common use for the marketing of the product known as fig-nuts?

A. 20. Yes, sir.

Q. 21. Did you see and become familiar with the advertising literaure issued by the company producing and marketing fig-nuts?

A. 21. Yes, sir.

Q. 22. Did you ever purchase the product known as California Fig-Nuts for your own use?

A. 22. Yes.

Q. 23. State whether or not you did use it personally?

A. 23. I did.

Q. 24. State what impression was created upon your mind as to [fol. 68] the ingredients contained in the product known as fig-nuts by the cartons in use and the advertising literature issued by the company marketing the product known as California Fig-Nuts?

Mr. Lyon: Objected to as incompetent, irrelevant and immaterial.

A. 24. I thought it was composed of figs and nuts.

Q. 25. You have stated that you are familiar with the cartons in common use for the sale of grape-nuts and the cartons in common use for the sale of California Fig-Nuts. State whether or not any confusion as to the character of the two products was ever created in your mind by either of the cartons.

Mr. Lyon: Objected to as leading and suggestive, incompetent, and not the best evidence. Not the proper method of proof.

A. 25. Not in my mind, knowing what I did of the two products, nor was it ever called to my attention, whether there was a difference in the two.

Q. 26. State whether or not you ever, from your observation of the two cartons mistook the product known as California Fig-Nuts for the product known as Grape-Nuts or vice versa?

Mr. Lyon: Objected to as leading and suggestive.

A. 26. No.

Mr. Moerdyke: That is all.

In answer to cross-interrogatories propounded to the witness by Frederick S. Lyon, Esq., counsel for Postum Cereal Company, Inc., he sayeth:

Cross-question 1. When did you retire from business?

Answer 1. The first of March, 1921.

X Q. 2. Up to that time you were in the wholesale grocery business?

A. 2. Yes.

[fol. 69] X Q. 3. Where?

A. 3. Los Angeles.

X Q. 4. Did you personally, yourself, sell to retail customers?

A. 4. Over the phone only. Occasionally I would.

X Q. 5. Then your business was that of a wholesaler, and not retailer?

A. 5. Yes, sir, wholesaler and not retailer.

Mr. Lyon: That is all.

A. A. Hunt.

C. S. Kious, being duly sworn, doth depose and say, in answer to interrogatories propounded to him by N. P. Moerdyke, Esq., counsel for California Fig-Nut Company, as follows, to-wit:

Question 1. Will you state your name?

Answer 1. C. S. Kious.

Q. 2. And your age?

A. 2. Sixty-seven.

Q. 3. Place of residence?

A. 3. Los Angeles, California, 2816 Menlo.

Q. 4. What is your occupation?

A. 4. Wholesale grocery business.

Q. 5. How long have you been in that business?

A. 5. Most of the time for the last thirty years.

Q. 6. Where have you been engaged in that business?

A. 6. Los Angeles.

Q. 7. Were you engaged during that time exclusively in the wholesale grocery business or during any portion of that time were you in the retail business?

A. 7. Never been in the retail business. Not here.

Q. 8. Was your wholesale grocery business of a considerable extent during that period of time?

[fol. 70] A. 8. Yes, we had a pretty fair business.

Q. 9. What was your average annual business, gross business, during that period of time?

A. 9. I presume around a million dollars part of the time, and part of the time it was probably twice that much, and the last two or three years it has been quite a little more than that.

Q. 10. You are familiar with the product known as grape-nuts?

A. 10. Yes, sir.

Q. 11. How long have you been familiar with that product?

A. 11. Well, ever since it was brought on to this market. I am under the impression that it has only been in this market about seventeen or eighteen years. It may have been manufactured before that, but I don't think it has been sold here for more than seventeen or eighteen years.

Q. 12. By that you mean it has not been sold in Los Angeles County for more than seventeen or eighteen years?

A. 12. Not that I have known of.

Q. 13. You have seen and become familiar with the carton in common use by the company manufacturing and selling grape-nuts?

A. 13. Yes.

Q. 14. And the advertising matter contained on the carton?
A. 14. Yes, sir.
Q. 15. State whether or not you have seen and become familiar with the advertising literature issued and published by the company producing this product?
A. 15. I have read their advertisement and seen a great many of them from time to time.
[fol. 71] Q. 16. Have you ever purchased grape nuts for your own personal use?
A. 16. Many times.
Q. 17. And used the product personally in your family?
A. 17. Yes, sir.
Q. 18. State what impression was made upon your mind as to the ingredients of grape-nuts by the cartons in use and the adertising matter contained on the cartons and the advertising literature published and issued by the company manufacturing grape-nuts.

Mr. Lyon: Objected to as incompetent, irrelevant and immaterial.

A. 19. I was under the impression that it contained grapes, and for some time I did not know any different.
Q. 19. State whether or not you are familiar with the product known as California Fig-Nuts?
A. 19. Yes, sir.
Q. 20. State whether or not you are familiar with the carton and the advertising matter contained thereon in common use for the sale of the product known as California Fig-Nuts?
A. 20. Yes, sir.
Q. 21. Have you seen and become familiar with the advertising literature published and issued to the trade and the public by the company manufacturing and selling California Fig-Nuts?
A. 21. Yes, sir.
Q. 22. Have you ever purchased California Fig-Nuts for your own personal use?
A. 22. Yes, sir.
Q. 23. Have you used it personally in your family?
A. 23. Yes, sir.
[fol. 72] Q. 24. State what impression was created in your mind by the carton and advertising matter contained thereon used for the sale of the product known as California Fig-Nuts and the advertising literature issued and published by the company manufacturing California Fig-Nuts as to the ingredients contained in the product?

Mr. Lyon: Objected to as incompetent, irrelevant and immaterial.

A. 24. The name and looks suggested to me that it contained figs and nuts, and after I used the goods I was quite sure that it did.
Q. 25. Will you state whether or not the cartons respectively in use for the sale of grape-nuts and fig-nuts and the advertising matter contained on these cartons ever at any time have created any confusion in your mind as to the relative characteristics of the two products?

Mr. Lyon: Objected to as leading and suggestive, incompetent, and not the proper method of proof. Not the best evidence.

A. 25. No, sir.

Q. 26. During this period of time within which you have testified you were engaged in the wholesale grocery business did you meet and become familiar with men in the retail grocery business?

Mr. Lyon: Objected to as leading and suggestive.

A. 26. Well, to a certain extent, yes.

Q. 27. State whether or not in the conduct of your wholesale business you called upon and discussed those matters with men engaged in the retail business?

Mr. Lyon: Objected to as leading and suggestive.

A. 27. A few of the larger ones.

Q. 28. Have you ever at any time discussed with them the two products known as grape-nuts and California fig-nuts?

[fol. 73] Mr. Lyon: Objected to as irrelevant and immaterial, leading and suggestive.

A. 28. I have sold them both, but I never discussed it with them.

Q. 29. State whether or not in the conduct of your wholesale grocery business you have ever known of a sale of the product known as fig-nuts where the order called for the product known as grape-nuts?

Mr. Lyons: Objected to as leading and suggestive.

A. 29. I have not.

Q. 30. Have you ever known the reverse to occur, that is, the sale of grape-nuts by error where fig-nuts was called for in the order?

Mr. Lyon: Same objection.

A. 30. I have not.

Mr. Moerdyke: That is all.

C. S. Kious.

The taking of the deposition under the notice which is hereto attached is closed.

IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG-NUT COMPANY

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, E. C. Thompson, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify that the foregoing deposition of Mrs. L. G. Marsh, Alex Cree, W. J. Zeiss, A. A. Hunt and C. S. Kious, were taken on behalf of the California [fol. 74-76] Fig-Nut Company, in pursuance of the notice hereto annexed, before me, at the office of John C. Stick, 811 Washington Building, Los Angeles, California, beginning at the hour of 9 o'clock a. m., of the 3d day of June, 1921; that each of said witnesses was by me sworn before the commencement of their testimony; that the testimony of each of said witnesses was written out by myself; that the opposing party, Postum Cereal Company, Inc., was represented by counsel, Frederick S. Lyon during the taking of said testimony; that said testimony was taken at the place above mentioned and was commenced at 9 o'clock in the forenoon of the 3d day of June, 1921, was continued pursuant to adjournment of the parties, and was concluded on the 7th day of said month; that the deposition was read by or to, each witness, before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter of controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Los Angeles, in said county, this 14th day of June, 1921.

E. C. Thompson, In and for the County of Los Angeles, State of California. (Seal.)

[fol. 77] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

In the Matter of the Registration of a Trade-mark for Breakfast Cereals by CALIFORNIA FIG NUT COMPANY, Orange California, under Act of March 19, 1920, Sec. 1 (b), January 18, 1821.

No. 139,066

To the Honorable Commissioner of Patents:

The undersigned, Postum Cereal Company, Inc., a corporation of Delaware, of Wilmington, Delaware, and Battle Creek, Michigan,

deems itself injured by such registration, and hereby petitions to cancel the same, upon the following grounds:

1. Petitioner is a Delaware corporation which, on May 18, 1920, succeeded to the business of Postum Cereal Company, a Michigan corporation, of Battle Creek, Michigan, which in 1916 succeeded to the business of Postum Cereal Co., Ltd., of Battle Creek, Michigan, a limited partnership association of the State of Michigan.

[fol. 78] 2. That prior to the year 1898 petitioner's predecessor, Postum Cereal Co., Ltd., placed upon the market a cereal breakfast food to which it applied as a trade-mark the word "Grape-Nuts." That the said trade-mark was, at the time of its adoption by petitioner's said predecessor, in all respects arbitrary, new, original, characteristic and distinctive, and had never before been used, and thereupon petitioner's said predecessor applied the said trade-mark to packages containing its said product by printing the same thereon, and using the same in connection therewith in other convenient ways, and petitioner's predecessors and, since petitioner's succession as aforesaid, petitioner has continued without interruption, from prior to the year 1898 to the present time, so to use said trade-mark in interstate and foreign commerce, and petitioner is now so using the same and has built up a wide and favorable reputation in its said product under the said trade-mark, so that said trade-mark is of great value to petitioner and indicates petitioner as the source and origin of the product to which it is applied, and indicates petitioner as the manufacturer thereof, and has no other meaning. A specimen of petitioner's label showing the use of its said trade-mark is hereto attached.

3. After due and proper proceedings in that behalf, petitioner's predecessor, Postum Cereal Co., Ltd., duly caused the registration of its said trade-mark as follows:

No. 31,689, June 14, 1898.
No. 51,153, April 3, 1906.
No. 71,262, November 10, 1908.
No. 80,492, December 27, 1910.

[fol. 79] That said registrations are valid and subsisting and petitioner is now the owner thereof.

4. The petitioner's predecessor, Postum Cereal Co., Ltd., is the same party as Postum Cereal Co., Ltd., opposer in Opposition No. 2098.

5. That the mark to cancel the registration of which this petition is filed, was registered under the Act of March 19, 1920, Sec. 1 (b), on January 18, 1921, and the essential feature of said mark, the word "Fig Nuts" so nearly resembles petitioner's said trade-mark the word "Grape-Nuts," long previously owned and in use by it and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the minds of the public and to deceive purchasers, and that said registrant was not entitled to the exclusive or any use, at or since the date of its application for registration, of the word "Fig-Nuts," and that petitioner deems itself

injured by said registration and therefore files this petition to cancel the same.

Please recognize as attorneys for the undersigned in this proceeding, Frank F. Reed and Edward S. Rogers, of Chicago, Illinois, and Francis L. Browne and Francis M. Phelps, of Washington, D. C.

Postum Cereal Company, Inc., by Arthur B. Williams, Secretary, Petitioner. Frank F. Reed, Edward S. Rogers, Francis L. Browne, Francis M. Phelps, Attorneys for Petitioner.

[fol. 80] STATE OF MICHIGAN,
County of Calhoun, ss:

Arthur B. Williams, being duly sworn, deposes and states that he is Secretary of the Postum Cereal Company, Inc., petitioner herein; that petitioner is a corporation, and that affiant makes this affidavit for it and in its behalf, and is duly authorized so to do; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true.

Arthur B. Williams.

Subscribed and sworn to before me a Notary Public in and for the County and State aforesaid, this 29th day of January, A. D. 1921, and I further certify that I am fully authorized under the laws of the State of Michigan to administer oaths.

Helen D. Hinman, Notary Public. (Seal.) Notary Public in and for Calhoun County, State of Michigan. My Commission expires July 3, 1923. —— ——, Notary Public. (Seal.)

[fol. 81] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC., Petitioner,

vs.

CALIFORNIA FIG-NUT COMPANY, Respondent

Testimony for Postume Cereal Co., Inc.

NOTICE OF TAKING TESTIMONY

To Mr. Arthur E. Wallace, Attorney for said California Fig-Nut Company, Respondent, 301, 537 South Dearborn Street, Chicago, Illinois:

Please take notice that on Monday, May 9, A. D. 1921, commencing at the hour of Ten o'clock A. M., Central Standard Time, the

depositions of the various witnesses, hereinafter named, will be taken an oral interrogatories on behalf of said Postum Cereal Company, Inc., Petitioner, in the above-entitled proceedings. Said depositions will be taken before Edna M. Forler, a notary public in and for the County of Calhoun, State of Michigan, who is duly qualified and authorized by the laws of the State of Michigan to administer oaths and take depositions, and who is wholly disinterested in the event of said above-entitled proceedings, and not of counsel or related to either party thereto. Said depositions will be taken at Room 626 Post Building, Corner of Maine Street, West, and McCamly Street, in the City of Battle Creek, Calhoun County, State of Michigan. The names of said witnesses whose depositions will be so taken are: [fol. 82] Arthur B. Williams, John S. Prescott, Harry E. Burt, Louis A. Zahrn, Charles E. Wiggins, Carl E. Trout, and Nellie McNaughton all residents of the said City of Battle Creek, Calhoun County, State of Michigan. Said depositions will either be taken down by said notary public upon a typewriter, or stenographically by a competent and disinterested stenographer who is not interested in the event of said proceeding or of counsel or related to either party thereto, and then transcribed in due form. The taking of said depositions will be continued from day to day until completed. In case of the absence or disability of said notary public, said depositions of said witnesses will be taken at the time and place aforesaid before another authorized, competent and disinterested officer.

At which said taking of said depositions you may appear and cross-examine if you see fit.

Dated Chicago, May 4, 1921.

Frank F. Reed and Edward S. Rogers, Attorneys and Solicitors for Postum Cereal Company, Inc., Petitioner.

—— ——, Notary Public.

Received a copy of the above notice this 4th day of May, 1921.
Arthur E. Wallace, Attorney and Solicitor for said California Fig-Nut Company, Respondent.

Exhibit A. Edna M. Forler, Notary Public, Calhoun County, Michigan. My Commission Expires Sept. 2, 1923. (Seal.)

[fol. 83] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC., Petitioner,

vs.

CALIFORNIA FIG-NUT COMPANY, Respondent

Deposition of John S. Prescott, taken Monday, May 9, A. D. 1921, commencing at the hour of 10 o'clock A. M. central standard time, upon oral interrogatories on behalf of the above-named petitioner, Postum Cereal Company, Inc., at room 626 Post building, corner of Main Street West and McCamly Street, in the city of Battle Creek, Calhoun County, Michigan, pursuant to the notice hereto attached, before Edna M. Forler, a notary public.

Said notice of taking of deposition is attached hereto as "Exhibit A" and made a part hereof; also stipulations as to evidence of Louis A. Zahrn and Harry E. Burt.

Present on behalf of Petitioner, Frank F. Reed, of Frank F. Reed and Edward S. Rogers, Attorney and of Counsel for Petitioner, and Arthur E. Wallace, Attorney and of Counsel for Respondent, California Fig-Nut Company.

[fol. 84] JOHN S. PRESCOTT

JOHN S. PRESCOTT, a witness named in said notice, having been first duly sworn and cautioned as by statute provided, testified as follows:

Direct examination by Frank F. Reed:

Question 1. Please state your name, residence and occupation.

Answer. John S. Prescott, 408 Lake Avenue, Battle Creek, Michigan. Assistant Secretary and Counsel for the Petitioner, Postum Cereal Company, Inc. Age 32 years.

Q. 2. Are you admitted to practice as a lawyer? If so, how long have you been practising, and where?

A. Yes. Since 1911, in the State of Michigan, at Battle Creek.

Q. 3. Please state how long, if for any time, you have acted as counsel for the Petitioner, the Postum Cereal Company, Inc., or its predecessors.

A. I have been counsel for the Postum Cereal Company, Inc., and its predecessors, since 1911.

Q. 4. State whether or not you were and are familiar with the reorganizations and transfers in connection therewith of the Postum Cereal Co., Ltd., in 1916, and the reorganization and transfers in connection therewith of the Postum Cereal Company, a Michigan corporation, in 1920, briefly and to what extent.

A. Yes. I assisted in the preparation of necessary documents for both transfers and am familiar with the details concerning them.

Q. 5. Please specify briefly, or identify, the documents which I [fol. 85] now hand you, being marked Exhibit B and purporting to be certain copies of documents relating to the Postum Cereal Co., Ltd., amendments to its Articles of Association and to the organization of the Postum Cereal Company, a Michigan corporation, all certified to by the Secretary of the State of Michigan.

A. This paper marked Exhibit B is a certified copy, and duly certified to by the Secretary of State of the State of Michigan, of the Articles of Association of the Postum Cereal Co., Ltd., a Michigan partnership association, of Battle Creek, Michigan, as amended; Articles of Reorganization of said Postum Cereal Co., Ltd., as a Michigan corporation; Certificate as to the adoption of Amended Articles of Association by said Company changing the name to Postum Cereal Company, and as to extension of Corporate Existence of said Company; Certificate of Amendment to the Articles of Association of said Company, and Certificate of Dissolution thereof.

(By Mr. Reed: Said certified copy referred to and identified by witness offered in evidence as Exhibit B.)

Q. 6. Were you at the time of the organization of Postum Cereal Company, a corporation, familiar with the laws of Michigan in regard to limited copartnerships and their incorporation, that is, their transfer from the limited copartnership class to corporation class?

A. Yes.

Q. 7. What, under those laws, was the effect of such change?

[fol. 86] (By Mr. Wallace: Objected to as calling for a conclusion of law which can only be determined by the court, the witness having no authority to decide what is the effect of any given course of action, and his testimony as to such effect being therefore incompetent and immaterial.)

A. The Postum Cereal Co., Ltd., by these proceedings referred to was reorganized into a Michigan corporation, and its name changed to Postum Cereal Company.

Q. 8. Was there a transfer of the assets of the Postum Cereal Co., Ltd., in connection with the organization or reorganization of the Postum Cereal Company, a corporation, to your knowledge?

A. Yes.

Q. 9. Is this document which I now show you and which for purposes of identification is marked C such transfer and are the signatures thereto genuine and authentic to your knowledge?

A. Yes.

Q. 10. Please examine the document which I now show you and which for identification is marked Exhibit C-1, a photostatic copy of the original document which you have just identified.

A. Yes.

(By Mr. Wallace: It is stipulated that the photostatic copy may be offered in evidence without filing the original.)

(By Mr. Reed: Photostatic Copy marked Exhibit C-1 offered in evidence on behalf of petitioner.)

[fol. 87] Q. 11. Please state whether the real estate connected with the Postum Cereal Co., Ltd., factories and owned by it and referred to generally in C-1, were transferred by deeds, descriptions, etc., and recorded in the office of the Recorder of Deeds at or about the same time as the execution of C-1 and as part and parcel of the transfer?

(By Mr. Wallace: Objected to as immaterial to the issues of this case.)

A. Yes.

(By Mr. Wallace: For the purpose of shortening the record, California Fig-Nut Company, by its counsel, hereby admits that Postum Cereal Co., Ltd., a partnership association, in December, 1916, executed an assignment to Postum Cereal Company, a corporation, covering all trade-marks theretofore registered by the assignor in the United States Patent Office, including registration Numbers 31,589; 51,153; 71,262; and 80,492, being the Grape-Nuts Registrations, and that said assignments were duly recorded in the Patent Office.)

Q. 12. Please state, if you know, whether after this reorganization and transfer or change of the Postum Cereal Co., Ltd., into and to the Postum Cereal Company, a corporation, the latter company took possession of the property of the copartnership, as shown by these transfers, and whether it continued the business of the limited copartnership.

A. Yes, it did.

[fol. 88] Q. 13. Who, if you know, was the owner of the principal portion of the stock of the Postum Cereal Co., Ltd.?

A. C. W. Post, of Washington, D. C., to the time of his death, May 9, 1914.

Q. 14. Please state, if I may call your attention to it, whether he was the owner of any of the shares of stock of the Postum Cereal Co., Ltd., as trustee, and if so, for whom?

A. He held one million dollars of the preferred stock of the company in trust for his daughter, Marjorie Post Close, now Marjorie Post Hutton.

Q. 15. During the period that you were acquainted with the affairs of the Postum Cereal Co., Ltd., under whose direction, if you know, were its business and affairs conducted practically?

A. By the Board of Managers of the Company and under them by a group of executives called the cabinet.

Q. 16. If you can do so, please name the members of the cabinet.

A. Carroll L. Post; Marshall K. Howe; Henry C. Hawk; Samuel H. Small; Harry E. Burt; Edward L. Branson; Frank C. Grandin, and Arthur B. Williams.

Q 17. And, if you know, please state who the executive officers of the Postum Cereal Co., Ltd., were, aside from the cabinet.

A. The executive officers were all members of the cabinet except Mr. C. W. Post, in his lifetime.

Q. 18. Please state, if you can, who the executive officers of the Postum Cereal Company, the Michigan corporation, were.

A. The above-mentioned members of the cabinet continued their [fol. 89] same functions, the same officers continuing in corresponding offices in Postum Cereal Company, the Michigan corporation.

Q. 19. Was there any cessation or break in the business when the Michigan corporation was formed?

A. No. The business went on in all respects as before the reorganization, at the same place, with the same organization and continuing the same business and activities.

Q. 20. Upon the death of Mr. C. W. Post, please state whether he left a last will and testament, if you know.

A. He did.

Q. 21. Please state if that will was duly probated and admitted to probate in Calhoun County, or elsewhere, and if so, where?

A. Yes. It was probated at Washington, D. C., in Calhoun County, Michigan, and in several other States.

Q. 22. To whom, if you know, by this will of C. W. Post, was his interest or stock in Postum Cereal Co., Ltd., devised?

A. One-half to his widow and one-half to his daughter, Marjorie Post Close.

Q. 23. Please state, if you can, the names of the executors appointed in the will of C. W. Post.

A. The above-named eight members of the company's cabinet.

Q. 24. And please tell us, if you can, what the executors did, stated briefly.

A. They conducted and carried on the business in behalf of the stockholders, the widow and daughter, until 1915, when the widow transferred all her stock to the daughter, and thereafter the execu- [fol. 90] tors, as officers and executives, continued to carry on the business as theretofore.

Q. 25. And did they continue to carry on the business in the same place and in the same manner after the Michigan corporation was organized?

A. They did.

Q. 26. Now when, if you recall, was the second reorganization, including the incorporation of the Postum Cereal Company, Inc., of Delaware?

A. In 1920, beginning in January of that year.

(By Mr. Reed: I offer in evidence, as Exhibit D, certificate of incorporation of Postum Cereal Company, Inc., of Delaware.)

(By Mr. Reed: I offer in evidence, as Exhibit E, License to do Business in Michigan of the Postum Cereal Company, Inc., of Delaware.)

Q. 27. I show you a document dated February 13, 1920, purporting to be signed by Postum Cereal Company, by Samuel H. Small,

First Vice-President, and Arthur B. Williams, Secretary, and witnessed and acknowledged, purporting to transfer from the Postum Cereal Company of Michigan to the Postum Cereal Company, Inc., of Delaware, all the assets of the Michigan corporation, marking the same for identification, Exhibit F, and ask you, if you can, to identify it and if the signatures are genuine.

A. This is the original document and the signatures are genuine.

Q. 28. Was it delivered on or about the time it bears date?

A. It was.

[fol. 91] Q. 29. Please state whether, to your knowledge, on or about the time this document F was executed, deeds of all the real estate of the Postum Cereal Company of Michigan were executed, delivered and recorded in Calhoun County.

A. They were, to Postum Cereal Company, Inc., of Delaware.

(By Mr. Reed: It is stipulated between counsel that said Document F, identified by witness, need not be included as exhibit, and in lieu thereof Exhibit F-1, being a copy of said document F, is offered in evidence.)

(By Mr. Wallace: That is correct.)

(By Mr. Wallace: To shorten the record counsel having examined the original assignment, it is admitted that all of the Grape-Nuts Patent Office Trade-Mark Registrations of the Postum Cereal Company and its predecessor were on May 18, 1920, assigned to Postum Cereal Company, Inc., a Delaware corporation, and that said assignment was duly recorded in the United States Patent Office under date of May 28, 1920.)

(By Mr. Reed: I offer in evidence certified copies of registration of trade-marks by Postum Cereal Co., Ltd., as follows:

Exhibit G; registered June 14, 1898, No. 31,689;

Exhibit H; No. 51,153, registered April 3, 1906;

Exhibit I; No. 71,262, registered November 10, 1908;

Exhibit K; No. 80,492, registered December 20, 1910.

[fol. 92] (By Mr. Wallace: The offer of these registrations in evidence is objected to for the reason that the validity of such registrations have not been proven, although such validity is denied in the answer and as incompetent under the issues in this case.)

Q. 30. Please state, if you know, whether or not Postum Cereal Company, Inc., of Delaware, took over in January and February, 1920, the business and assets of the Postum Cereal Company, and succeeded to the business of the Postum Cereal Company, and continued it in the same place, in the same way and under the same general supervision.

A. They did, in the spring of 1920.

Q. 31. And what about the continuation of the prior business by the Delaware corporation after taking over the business and property to the present date. How has it been done, if at all.

A. The Delaware company, Postum Cereal Company, Inc., petitioner in this case, continued to conduct and carry on the business with the same management, personnel, at the same place, and with

the same property as its predecessor in all respects as the predecessor had done, and so continues.

Q. 32. Who are the officers of the Delaware corporation, if you know?

A. Carroll L. Post, Chairman of the Board of Directors; Samuel H. Small, President; Arthur B. Williams, First Vice-President and Secretary; Henry C. Hawk, Second Vice-President; Edward F. Hutton, husband of the principal owner, Third Vice-President; Colby M. Chester, Jr., Treasurer; Harry E. Burt, Director and General Superintendent; Samuel H. Small, the President, Sales Manager; [fol. 93] Arthur B. Williams, General Counsel; Edward L. Branson, Member of the Cabinet; Mr. Howe died in 1918, and Mr. Grandin is no longer connected with the company, otherwise the members of the cabinet continuing to hold those positions.

Q. 33. Please look at the package, or carton, of Grape-Nuts now shown you, and state where you obtained it, and identify it?

A. This is a carton of Grape-Nuts which I took this morning from the conveyor belt in the factory of Postum Cereal Company, Inc., containing the food Grape-Nuts manufactured and sold by that Company. It is marked with my name and the date, May 9, 1921.

Q. 34. Did you write your name and the date when you took it?

A. I did.

Q. 35. Was this package taken by you without any selection from the general run?

A. Yes, it was taken from the conveyor belt in the packaging machinery.

(By Mr. Reed: Offered in evidence as Exhibit L.)

By Mr. Reed:

Q. 36. I show you another package of Grape-Nuts marked Exhibit M and ask you where you obtained it.

A. I purchased this package of Grape-Nuts at the store of T. F. Whalen Grocery Company, grocers, in Battle Creek, this morning.

Q. 37. Was it handed to you by the clerk or person who waited upon you out of stock in that grocery?

A. It was.

[fol. 94] (By Mr. Reed: Offered in evidence as Exhibit M.)

Q. 38. Please identify Exhibit M further by writing your name and date thereon.

(Witness does so.)

A. I have done so.

(By Mr. Reed: I offer in evidence package as Exhibit N labeled on the front "California Fig-nuts;" Trade Mark Reg. U. S. Pat. Office, Vignette of Two Figs and Seven Peanuts, and below the words, "A cereal ready to serve—something different, distinctive in flavor." All on front label.)

(By Mr. Wallace: Counsel for registrant admits this is one of registrant's packages.)

(By Mr. Wallace: Counsel for respondent, being handed a booklet, bearing upon its cover a representation of a package with the front label headed, "Cereal California Fig-Nuts," and having two small printed slips printed on yellow paper, the said pamphlet purporting to contain twenty-four (24) pages, consents that this be offered in evidence, without objection, subject to verification as one of the respondent's advertising booklets.)

(By Mr. Reed: And thereupon counsel for petitioner offers said booklet in evidence as Exhibit O.

And thereupon by consent of counsel adjournment is had in the taking of depositions until 1:30 Standard Time.)

[fol. 95] Met pursuant to adjournment at 1:30 P. M. Same persons present.

It is stipulated by and between counsel that the exhibits identified and offered in evidence need not be attached to the dispositions or returned therewith to the Patent Office, but that each and all exhibits referred to or offered in evidence may be kept in the custody of the counsel of petitioner subject to production on the hearing and to be produced by said counsel at the hearing, and to be at all times in the office of the counsel for petitioner subject to the inspection, examination, copying and comparing copies thereof by counsel of registrant and respondent. We agree to the above stipulation: Frank F. Reed and Edward F. Rogers, Counsel for the Petitioner; Arthur E. Wallace, Counsel for Registrant and Respondent.

(By Mr. Reed: I offer in evidence Certificate of the State of California, Department of State, No. 2865, dated May 17, 1910, of the words, "Grape-Nuts," and claim to trade-mark therein to be used in connection with manufacturing and marketing cereal food, same marked P.)

(By Mr. Wallace: Objected to as not complete, the specifications referred to in said Certificate not bing attached thereto, but Counsel stipulates that copy of the Certificate mentioned may be used as the exhibit instead of the original.)

(By Mr. Reed: Copy of the above-named document being Certificate 2865 of Registration in California, marked P, is marked Exhibit P-1 and offered in evidence to be used in lieu of the above certificate.)

[fol. 96] (By Mr. Wallace: Same objection as last above noted.)

By Mr. Reed:

Q. 39. I show you a book, or pamphlet, or booklet, bearing on the outside cover a colored Vignette of the entrance end of the offices of the Postum Cereal Company, and below the letter press, "Observe

and Reflect so as to Know the Truth," the same being marked Exhibit Q. Please identify it if you can.

A. This booklet, Exhibit Q, is a souvenir advertising booklet put out by Postum Cereal Company, Inc., in large numbers, being used to give to the many visitors who go through the Company's Offices and Factories.

Q. 40. How long has that identical pamphlet been used in the way you describe?

A. About a year.

Q. 41. Prior to that time were booklets similar used for that purpose, and if so, for how long, to your knowledge?

A. Yes, for several years.

Q. 42. Are the purported cuts or illustrations showing therein mechanism, machinery and process of manufacturing of Grape-Nuts true and correct?

A. They are.

Q. 43. What have you to say about the accuracy and correctness of the carton cut from Grape-Nuts on the last page of Exhibit Q.

A. It is an accurate representation of the Grape-Nuts carton.

(By Mr. Reed: Book referred to by witness offered in evidence as Exhibit Q.)

[fol. 97] Q. 44. What is the fact, if you know it, of the Postum Cereal Company, Inc., of Delaware, and its two predecessors, the Postum Cereal Company, of Michigan and Postum Cereal Co., Ltd., being large and national advertisers of Grape-Nuts, and please specify how long you have known it?

A. The Delaware company, the Michigan corporation, and the Michigan partnership association have always been large national advertisers.

Q. 45. Have those three companies advertised Grape-Nuts largely and nationally? And if so, to your knowledge, how long?

A. Yes, as far back as 1900, I would say, and probably before.

Q. 46. I wish you would state whether the two packages of Grape-Nuts identified by you and offered in evidence during the morning session as Exhibits L and M, are fairly representative of the cartons used by the various Postum Cereal Companies during your connection with them or any of them.

A. Yes.

Q. 47. I wish you would state if you know or recall whether the cartons of Grape-Nuts have always borne substantially the same letter press as these Exhibits L and M.

A. Yes, during all my connection with the institution.

(By Mr. Reed: I offer in evidence letter dated Los Angeles April 1, 1921, addressed to Postum Cereal Co., Inc., Battle Creek, Michigan, consisting of two pages and purporting to be signed by Mailliard & Schmiedell, on the letterhead of the signer, as Exhibit R, and the [fol. 98] two sales tickets of Albert Cohn, Grocers, attached thereto, as Exhibits R-1 and R-2, together with the receiving stamps on said letter dated April 6, 1921.)

(By Mr. Wallace: Objected to as hearsay and secondary evidence, consisting essentially of a statement made by outside parties and without the knowledge of the respondent and not in the presence of the respondent or any of its officers or agents, and without the party or parties making the statement being produced for a cross-examination, and counsel for respondent moves that the letter and sales slips attached be stricken from the records.)

Q. 48. I will ask you if you are acquainted with the signature of Mailliard & Schmiedell.

(By Mr. Wallace: Objected to as immaterial and incompetent.)

A. I am.

Q. 49. Look at the signature of Mailliard & Schmiedell by typewriter by E. W. Sweeney, E. W. Sweeney being in ink writing. State whether or not that signature is a genuine signature of Mailliard & Schmiedell by Mr. Sweeney.

(By Mr. Wallace: Objected to as immaterial and incompetent.)

A. It is.

Q. 49. What are these two red stamps on the first page——

(By Mr. Wallace: Same objection.)

[fol. 99] A. The stamp "Received P. C. Co. April 6, 1921, entered —— —, ——, Ans'd —— —, ——," is the general receiving stamp of Postum Cereal Company, Inc., and the time stamp, "Received April 6, 1921, J. S. Prescott, Legal Department," is the receiving stamp of my office.

Q. 50 Are both these stamps genuine?

(By Mr. Wallace: Same objection.)

A. They are.

Q. 51. Please state whether with the exception of these two stamps on the first page which you have designated as receiving stamps, the two pages of letter, Exhibit R, and the sales slips, designated as Exhibit R-1 and Exhibit R-2, are in the same condition as when received by your office.

(By. Mr. Wallace: Same objection.)

A. They are.

Q. 52. I wish you would state, if you know, the trade and sales in and of Grape-Nuts since you have been connected with the manufactories thereof as to whether large or small, and give us, if you can, a general idea of the extent of that trade and sale territorially.

A. It was very large through all that time and is now, and extends and has extended through all that time over the entire United States and in foreign countries.

Cross-examination by Mr. Wallace:

X Q. 1. Are you interested in the corporation Postum Cereal Company, Inc., otherwise than as an attorney?

[fol. 100] A. No, I am not a stockholders or interested in the company otherwise than as an employe.

X Q. 2. And to what does your employment extend?

A. I am assistant secretary and counsel for the company.

X Q. 3. Does your knowledge extend to all the details of manufacture of the goods sold as Grape-Nuts?

A. No.

X Q. 4. You have testified on the direct examination, as I understand it, that all the statements made and illustrations shown in the book or booklet Exhibit Q are correct. If you are not acquainted with the details of the manufacture how could you make such a statement?

(By Mr. Reed: I do not recall any statement that the statements in the booklet were all correct, but simply that the illustrations and pictures and the cut of the carton of Grape-Nuts are correct.)

(By Mr. Wallace: Question withdrawn.)

X Q. 5. Do you know what enters into the composition of Grape-Nuts?

(By Mr. Reed: Objected to as not proper cross-examination.)

A. Wheat and malted barley.

X Q. 6. Are any other materials used outside of the two you have named? Such as some product of the grape or of nuts of any kind.

A. No, except salt and yeast.

[fol. 101] (By Mr. Reed: Same objection.)

X Q. 7. ——.

Cross-examination closed.

Redirect examination:

Red. Q. 1. Do you recall whether while you have been acquainted with it the advertising of Grape-Nuts put out by its proprietor or any proprietor stated anything as to its ingredients, that is, the ingredients of Grape-Nuts, and if so, what it did state?

A. I do. The advertising put out by the company and its predecessors has for many years stated what the ingredients are, and the advertising stated in a variety of ways the fact that it is made from whole wheat and barley malt flour.

Red. Q. 2. Please state whether, if you recall, this advertising matter in reference to Grape-Nuts had anything to say of the character of the word Grape-Nuts, and if so, what was it.

A. The advertising has frequently stated that the word Grape-Nuts is an arbitrary name coined to designate the food put up and sold in packages such as Exhibits L and M.

Red. Q. 3. What is the fact, if you recall, as to any statement

on the carton in which Grape-Nuts have been sold as to the ingredients of Grape-Nuts, and if you recall, what were those statements?

A. The cartons in which Grape-Nuts are sold have for many years carried the statement, "Made of wheat and barley." I recall that [fol. 102] for a long period reference to salt and yeast was also made. Statements substantially identical with those appearing on Exhibits L and M have appeared on the cartons as far back as I can remember.

Red. Q. 4. Are wheat flour and malted barley flour the principal ingredients of Graps-Nuts, as you understand?

A. They are.

Red. Q. 5. And so far as you know have they always been?

A. Yes.

Red. Q. 6. And what about the percentage of yeast and salt, has the percentage of each always been small or large?

A. Very small, and merely for seasoning and making of the product.

Recross-examination:

Re-X. Q. 1. When you said that the word Grape-Nuts is an arbitrary name coined to designate the food put up and sold in packages such as Exhibits L and M, did you mean to infer that the word Grape or the word Nuts were either coined by the applicant or its predecessor, or just what did you mean in using the word coined as applied to this name.

A. I meant that the compound of the two words "Grape and Nuts" was originally selected arbitrarily as a name for this food and used for that purpose ever since.

Second redirect examination:

S. Red. Q. 1. Did you mean or intend by the last question put to you by counsel for the registrant and responednt to state that [fol. 103] the word "Grape-Nuts" was a new or newly coined word?

A. No, except in combination.

S. Red. Q. 2. That is exactly what I mean. Did you mean that the word "Grape-Nuts" was new and arbitrary?

A. Yes.

John S. Prescott.

Subscribed and sworn to before me this 10th day of May, A. D. 1921. Edna M. Forler, Notary Public, Calhoun County, Michigan. My commission expires Sept. 2, 1923. (Seal.)

[fol. 104] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC., Petitioner,

vs.

CALIFORNIA FIG-NUT COMPANY, Respondent

STIPULATION

It is stipulated by and between counsel for the Postum Cereal Company, Inc., petitioner, and the California Fig-Nut Company, registrant and respondent, that if Louis A. Zahrn were called as a witness and sworn in the above-entitled suit he would testify that the following statements as to Grape-Nuts sales by cartons, and in cartons similar to those already in evidence as Exhibits L and M, beginning October, 1908, by years, terminating March, 1921, as follows:

October, November and December, 1908	3,010,476
1909	17,844,648
1910	16,915,584
1911	14,258,088
1912	18,701,472
1913	24,591,504
1914	22,809,408
1915	22,823,712
1916	27,608,064
1917	28,595,016
1918	33,139,272
1919	38,026,656
1920	38,136,912
January, February and March, 1921	7,549,296
Total	314,010,108

[fol. 105] are true and correct approximately as shown by the books of the Company.

And that the following statement is a statement of Grape-Nuts sales in California from October 1, 1907, by years, to December 31, 1920:

Oct. 1, 1907, to Sept. 30, 1908	543,672
Oct. 1, 1908, to Sept. 30, 1909	529,996
Oct. 1, 1909, to Sept. 30, 1910	351,321
Oct. 1, 1910, to Sept. 30, 1911	407,580
Oct. 1, 1911, to Sept. 30, 1912	508,991
Oct. 1, 1912, to Sept. 30, 1913	748,405
Oct. 1, 1913, to Sept. 30, 1914	661,492
Oct. 1, 1914, to Sept. 30, 1915	938,249
Oct. 1, 1915, to Sept. 30, 1916	980,442
Oct. 1, 1916, to Dec. 31, 1917 (15 months)	1,352,158
Jan. 1, 1918, to Dec. 31, 1918	1,210,256
Jan. 1, 1919, to Dec. 31, 1919	1,521,432
Jan. 1, 1920, to Dec. 31, 1920	1,682,139
Total	11,436,124

approximately as shown by the books of the Company.

Dated at Battle Creek, Mich., May 9, 1921.

Frank F. Reed, Attorney for Postum Cereal Company, Inc., Petitioner. Arthur E. Wallace, Attorney for California Fig-Nut Company, Registrant and Respondent.

[fol. 106] Made, entered into and signed before me, May 9, 1921. Edna M. Forler, Notary Public, Calhoun County, Michigan. My commission expires Sept. 2, 1923. (Seal.)

[fol. 107] IN THE UNITED STATES PATENT OFFICE

Cancellation No. 666

POSTUM CEREAL COMPANY, INC., Petitioner

vs.

CALIFORNIA FIG-NUT COMPANY, Respondent

STIPULATION

It is stipulated by and between counsel for the Postum Cereal Company, Petitioner, and the California Fig-Nut Company, Registrant and Respondent, that if Harry E. Burt were called and sworn as a witness he would testify substantially as follows:

That he has been connected since 1896 as General Superintendent with the Postum Cereal Co. Ltd., the Postum Cereal Company, of Michigan, and the Postum Cereal Co., Inc., of Delaware; that in each case the succeeding company took over all of the property assets,

machinery, processes, trade-marks and business of the proceding company and continued the business and manufacture of the products of the company, including Grape-Nuts, at the same place, in the same general way and under the same general supervision, and the same materials; that there was no break or interruption of business continuity upon either or both of the other successors; that all these companies were extensive national advertisers of Grape-Nuts, beginning about 1896 and expending millions of dollars in advertising Grape-Nuts.

That the word "Grape-Nuts" was selected and as a compound word coined and used for the purpose of designating and indicating the [fol. 108] product first of the Postum Cereal Co., Ltd., then of its successor, the Postum Cereal Company, in Michigan, and then that of its successor, the Postum Cereal Company, Inc., of Delaware.

That there never has been used in the manufacture of Grape-Nuts by any of the companies manufacturing Grape-Nuts either grapes or nuts or any ingredient derived from either.

That the advertising matter of the Postum Cereal Co., Ltd., and of the succeeding companies has referred for many years, and frequently, to the fact and stated the fact to be that the word "Grape-Nuts" in connection with this food was arbitrary and fanciful; that the same advertising matter almost from the beginning when Grape-Nuts were first manufactured, about 1897 or 1898, gave the ingredients thereof sometimes referring simply to the principal one, which are wheat flour and malted barley flour; that the cartons have from the beginning through all the manufacture of Grape-Nuts stated and set forth that Grape-Nuts were made of wheat flour and malted barley flour; the form varying somewhat, and sometimes either adding or substituting the statement that Grape-Nuts were made of wheat flour, malted barley flour, salt and yeast; that wheat flour and malted barley flour are and always have been the chief ingredients of Grape-Nuts, and this statement has been made in variant forms, but substantially to that effect; that wheat flour, malted barley flour, salt and yeast are all of the ingredients ever employed in the manufacture of Grape-Nuts, the wheat flour and malted barley flour being the principal and chief ingredients.

That the ingredients and process of manufacturing Grape-Nuts [fol. 109] always employed result in dextrinizing or partly digesting under the process employed the ingredients and converting some portion of the ingredients into grape sugar, dextrine and dextrose.

That this stipulation is entered into in lieu of the deposition and evidence of said Harry E. Burt.

Frank F. Reed, Attorney for Postum Cereal Company, Inc., Petitioner. Arthur E. Wallace, Attorney for California Fig.-Nut Company, Registrant and Respondent.

Made, entered into and signed before me, May 9, 1921. Edna M. Forler, Notary Public, Calhoun County, Michigan. My commission expires Sept. 2, 1923. (Seal.)

STATE OF MICHIGAN,
County of Calhoun, ss:

I, Edna M. Forler, a notary public within and for the County of Calhoun and State of Michigan, do hereby certify that the foregoing deposition of John S. Prescott was taken on behalf of the Petitioner, Postum Cereal Company, Inc., on oral interrogatories in the proceeding now pending in the United States Patent Office known as Cancellation No. 666, wherein Postum Cereal Company, Inc., is Petitioner, and California Fig-Nut Company is Registrant and Respondent; pursuant to the notice hereto annexed and marked Exhibit A, before me at Battle Creek, in the said Calhoun County in the State of Michigan, on the 9th day of May, A. D. 1921; that the said witness was by me first, and before the commencement of [fol. 110] his testimony or any examination, duly sworn and cautioned as by statute required; that testimony of said witness was written out by myself in the presence of counsel for the respective parties; that the opposing party, California Fig-Nut Company, was present by its counsel, Arthur E. Wallace, during the taking of said testimony; that said testimony was taken at Room 626, Post Building, Corner Main Street, West, and McCamly Street, in the said City of Battle Creek, Calhoun County, Michigan, commencing at the hour of ten o'clock, Central Standard Time, on the 9th day of May, A. D. 1921, and continuing pursuant to adjournment on said day about 12:15 P. M. until 1:30 P. M., Central Standard Time, on said day, and was concluded on said 9th day of May, A. D. 1921; that after being taken down by me, as above written, the said deposition was read over by said witness, John S. Prescott, before said witness signed the same, and then subscribed and sworn to before me by said John S. Prescott;

That I am not connected by blood or marriage to either of said parties to said controversy, nor interested directly or indirectly in the matter in controversy; that I am wholly disinterested in the event of the above proceeding and not of counsel or related to either party thereto; and that I am duly authorized by the Laws of the State of Michigan, as such notary public, to administer oaths and take depositions; that the various stipulations, statements and agreements of counsel above noted in said deposition were entered into in my presence and in the presence of both of said counsel for said parties and by me noted down; that the said John S. Prescott is a resident [fol. 111] of the said City of Battle Creek, Calhoun County, State of Michigan; that the above and foregoing stipulations in regard to the testimony of Louis A. Zahrn and Harry E. Burt were entered into and signed by the respective counsel to the parties of said proceeding in my presence and included with the consent of said counsel in lieu of the depositions of said Louis A. Zahrn and Harry E. Burt, respectively; that the other witnesses named in said notice, to wit, Arthur B. Williams, Charles E. Wiggins, Carl E. Trout and Nellie McNaugton were not called, produced or sworn as witnesses;

That the Exhibits marked Exhibits B, C-1, D, E, F-1, G, H, I, K, L, M, N, O, P-1, Q, R, R-1, R-2, were produced submitted to counsel for respondent, and have been identified by me by writing my name, official position and affixing my notarial seal thereon,

and were by consent and stipulation of counsel for respondent delivered to and left in the custody of Frank F. Reed, attorney for petitioner, as stipulated and agreed, and by me noted down in said deposition; that the originals of the Exhibits marked C-1, F-1 and P-1 were produced, shown to said witness and identified by him, and have been marked by me respecively C, F and P, and signed by me as notary public and my seal attached, and that the said copies thereof respectively marked C-1, F-1 and P-1 were by consent of the attorney for respondent introduced in evidence in lieu of the originals, the said originals not being introduced or offered in evidence but submitted copies offered and received; that the annexing and returning of each and all of the said exhibits with the deposition was waived by attorney for respondent and the custody thereof to counsel for petitioner consented to, the same to be produced by said [fols. 112-114] counsel at the hearing of said cause and subject to the examination at the office of counsel for petitioner by counsel for respondent at all reasonable times; that the said exhibits and each of them were retained in my possession and custody until delivered to said attorney for petitioner pursuant to stipulation and agreement of counsel, and that the said deposition of the said John S. Prescott and the said stipulations in reference to the testimony of Louis A. Zahrn and Harry E. Burt above set forth were retained in my possession and custody until the said deposition was sealed up and addressed to the Patent Commissioner of the United States, at Washington, D. C.

Edna M. Forler, Notary Public, Calhoun County, Michigan.
My commission expires September 2, 1925. (Seal.)

My fees, $20.00, paid by Petitioner.

[fol. 115] IN THE UNITED STATES PATENT OFFICE

Cancellation Application No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY

Record for Postum Cereal Company, Inc.

DEPOSITIONS OF E. W. SWEENEY AND R. G. RAYMER

Taken pursuant to stipulation and agreement, and on behalf of Postum Cereal Company, Inc., in the above-entitled proceeding, commencing at the hour of 3 p. m. on Thursday, August 25, 1921, at the offices of Messrs. Lyon & Lyon, No. 312 Stock Exchange Building, city of Los Angeles, county of Los Angeles, State of California, before John P. Doyle, a notary public in and for said county and State duly commissioned and sworn.

Present: Frederick S. Lyon, Esq., representing Frank F. Reed and Edward S. Rogers, attorneys for Postum Cereal Company, Inc.,

[fol. 116] petitioner, and John C. Stick, Esq., representing Arthur E. Wallace, Esq., attorney for California Fig-Nut Company.

Whereupon the following proceedings were had:

E. W. Sweeney

E. W. Sweeney, called as a witness on behalf of the Postum Cereal Company, Inc., being first duly sworn according to law, testified as follows:

Direct examination by Mr. Lyon:

Question. Please state your name, age, residence and occupation?

Answer. E. W. Sweeney; age, 41; 1546 Fifth Avenue, Los Angeles, California; resident partner of Mailliard & Schmiedell, manufacturer's agents, importers and brokers.

Q. I hand you three papers forming Exhibits R-1 and R-2 in these proceedings, and ask you if you have ever seen them before (handing papers to witness)?

A. Yes.

Q. Under what circumstances and when did you first see them, Mr. Sweeney?

A. When I went in to make a purchase in Albert Cohn's on—according to the date there—January 27, 1921.

Q. What time of the day was it you went into Albert Cohn's store in Los Angeles to make the purchase referred to in your last answer?

A. Shortly after lunch; right after one o'clock.

Q. Were you alone?

A. No; I had Mr. R. G. Raymer with me.

Q. Please go ahead and detail the circumstances under which you first saw these exhibits to which I have called your attention. Tell the story in your own way, stating what occurred, and so forth.

[fol. 117] A. I merely went in and asked for a package of Fig-Nuts and the clerk that waited on me put down a package of Fig-Nuts, and I was requested to get a sales slip of the purchase, and I asked for a sales slip, and he wrote up the first sales slip here, "1 Grape Nuts," and after he had written it I called his attention to it; in fact I was not looking at the time and he had it written up, and I said, "That calls for a package of Fig-Nuts." and he had the package of Fig-Nuts there, and I just took it and put the package of Fig-Nuts in my pocket and he took this tag and tore it out and threw it away, and Mr. Raymer said, "We might as well take this along too," and he gave me another tag. That is all there was to it.

Q. You say he gave you another tag. What tag did he give you?

A. This tag here calling for "1 Fig-Nuts."

Q. That is what exhibit?

A. R-1.

Q. Did you know the clerk that made this sale to you?

A. No.

Q. Have you any way of identifying him?

A. I wouldn't know him. I didn't attach any importance to his identity at all.

Q. Do you know who wrote the name "Cree" on these sales slips, Exhibits R-1 and R-2?

A. Well, this sales slip marked "Exhibit R-1" reads, up here, "Sold by A. Cree," and I imagine it would be A. Cree that sold it. I didn't know that it was Mr. Cree, though.

Q. Well, the clerk that sold it to you wrote the name "A. Cree" on that slip?

A. Oh, yes. He filled out the entire slip. When he made out this Fig-Nuts tag here, he handed it to some other man there that checked it out. I suppose that is their system. I don't know just exactly what is their particular system, but I know someone checked it there.

[fol. 118] Q. When you went into Albert Cohn's store in Los Angeles for what purpose was it?

A. Just to buy a package of Fig-Nuts.

Q. Did you have any idea that it was for evidence in any legal proceedings or anything of that kind?

A. Nothing any more than we had instructions from the Postum Cereal Company to buy Fig-Nuts in the open market and send them to the factory and obtain sales slips and mark the packages for identification, which I did. Those Packages went to—I don't recall the name of their attorney now, but whoever it was, I sent the packages with my name written on them, and the date of purchase, and where I purchased it, together with these sales slips.

Q. D-d you have any indications in your instructions whatever as to the purpose for which the Fig-Nuts packages, cartons or sales slips were to be used?

(Mr. Stick: I object to that unless the instructions are shown, for the reason that the instructions themselves would be the best evidence.)

A. I had nothing more than a telegram, which I have here, that, if there is no objection to reading it—it simply says: "Please purchase four packages Fig-Nuts from local retailer and mail promptly carefully protecting to avoid crushing in transit mark packages so you could later identify them as purchased by you also preserve sales slip for record to identify purchase later on if necessary."

Q. You have produced the telegram; will you show it to Mr. Stick, the attorney for the California Fig-Nut Company?

(Witness hands telegram to Mr. Stick.)

Mr. Lyon: You don't care for the original, do you?

M. Stick: No.

[fol. 119] Mr. Lyon: It is stipulated that the original telegram is produced and shown, and that otherwise than as incorporated in the preceding answer of the witness it need not be made an exhibit in the case.

You may cross-examine, Mr. Stick?

Cross-examination by Mr. Stick:

Q. Where were you when Mr. Cree wrote out these exhibits R-1 and R-2?

A. Right in front of the counter in Albert Cohn's store.

Q. Were you watching him write them out?

A. Oh, naturally; I was standing there, just like I am here, looking at the counter, and he was writing out the tags. They lay right on top of the counter.

Q. And you saw him writing?

A. Oh, yes.

Q. And did you see what he wrote, himself, at that time?

A. Yes.

Q. You saw each word as he put it down?

A. Yes. I was naturally interested because I wanted the tags made out to E. W. Sweeney. That is the way they read. I didn't want them made out to cash or anything like that; I wanted them made out the E. W. Sweeney, and spelled the name for him.

Q. Did you have any other instructions at that time from anyone regarding the purchase of this package?

A. No.

Q. These are the only instructions you had?

A. These are the only instructions I had.

Q. From any source?

A. From any source.

Mr. Stick: That is all.

Mr. Lyon: That is all.

E. W. Sweeney.

[fol. 120] R. G. RAYMER

R. G. RAYMER, called as a witness on behalf of the Postum Cereal Company, Inc., being first duly sworn according to law, testified as follows:

Direct examination by Mr. Lyon:

Question. Please state your name, age, residence and occupation?

Answer. R. G. Raymer; age, 34; residence, 1321 West Fifty-third Street, Los Angeles; occupation, salesman for Mailliard & Schmiedell.

Q. Are you acquainted with Mr. E. W. Sweeney, who has just testified in this proceeding?

A. I am.

Q. I show you certain sales slips which have been marked Exhibits R-1 and R-2 in this proceeding (handing papers to witness). Have you ever seen them before?

A. I have.

Q. When did you first see them, Mr. Raymer? And state the circumstances as well.

A. The first time I saw these slips was on the date printed thereon, January 27, at Albert Cohn's Main Street store, Second and Main, in the city of Los Angeles. At the time I was with Mr. Sweeney, and he asked the clerk for a package of Fig-Nuts. The clerk went to a shelf and brought out a package of Fig-Nuts and set it on the counter, and Mr. Sweeney asked him for a sales tag or a receipt, and the clerk wrote—or started to write out the receipt and Mr. Sweeney said, "I notice you have put down 'Grape-Nuts,' " and the clerk thereupon tore the sheet out of his book and kind of threw it on the counter and wrote out the other slip for the package of Fig-Nuts and [fol. 121] had it properly receipted, and if I remember correctly he handed it to some other man in that department who either checked it up or O. K.'d it.

Q. And at that time did the clerk deliver to Mr. Sweeney a package of Fig-Nuts?

A. He did. He brought down a package of Fig-Nuts and laid it on the counter.

Q. And then wrote this first slip calling for "1 Grape Nuts"?

A. And then wrote the slip out, "1 Grape Nuts."

Q. What was your purpose in accompanying Mr. Sweeney on that date?

A. At his request.

Mr. Lyon: You may inquire.

Cross-examination by Mr. Stick:

Q. Did he tell you why he was going to buy the Fig-Nuts?

A. He showed me the telegram from the Postum Cereal Company asking him to purchase four packages of Fig-Nuts.

Q. And that is the telegram that has been shown here?

A. That is the telegram that has been shown here.

Mr. Stick: That is all.

Mr. Lyon: That is all.

R. G. Raymer.

Mr. Lyon: The sales slips marked Exhibits R-1 and R12, respectively, are offered in evidence in connection with the testimony of these witnesses.

[fol. 122] State of California,
County of Los Angeles, ss:

I, John P. Doyle, a Notary Public within and for said County and State, duly commissioned and sworn according to law, do hereby certify that the foregoing depositions of E. W. Sweeney and R. G. Raymer were taken before me on behalf of the Postum Cereal Company, Inc., in the above entitled proceedings pursuant to stipulation and agreement of counsel; that said depositions were taken commencing at three o'clock p. m. on August 25, 1921, at the offices of Messrs. Lyon & Lyon, No. 312 Stock Exchange Building in said

City, County and State; that each of said witnesses was by me duly sworn to testify the truth, the whole truth and nothing but the truth in giving his said deposition; that said depositions were by me taken stenographically from question by counsel and answer by witness and reduced to typewriting by me and under my direction, and thereafter read over and signed by said respective witness, the reading over of said respective depositions and the signing thereof in the presence of counsel being by counsel expressly waived; that the foregoing record is a true and correct record of all proceedings had and questions asked and testimony given on the taking of said depositions; and that I am not a party to said proceeding, nor interested, directly or indirectly, therein, nor related by blood or marriage or as a stockholder or otherwise interested in either of the parties to said proceedings.

In witness whereof, I have hereunto set my name and affixed my seal of office this 26th day of August, 1921.

John P. Doyle Notary Public, Los Angeles County, California.
(Seal.)

[fol. 123] Patent Office,
May 12, 1922,
Mailed.

Paper No. 36

Final Hearing: Dec. 9, 1921.

In the United States Patent Office

Cancellation No. 666

Postum Cereal Company, Inc.,

v.

California Fig Nut Company

Registration No. 139,066. Issued January 18, 1921

Breakfast Cereals

Messrs. Frank F. Reed and Edward S. Rogers, and Messrs. Francis L. Browne and Francis M. Phelps for Postum Cereal Company, Inc.
Mr. Arthur E. Wallace for California Fig Nut Company.

This is a cancellation proceeding brought under the provisions of Section 2 of the Trade-Mark Act of March 19, 1920.

It is convenient to hereinafter designate the applicant for cancellation, and the registrant, by the terms petitioner and respondent, respectively.

The mark used by the respondent discloses a compound word "Fig-Nuts" with a pictorial representation of figs and peanuts asso-

ciated therewith. The goods on which this mark is used is described as a "breakfast cereal."

At the outset it is contended by the respondent that the petitioner has no standing by reason of the nature of the mark relied upon by the latter. This is the notation "Grape-Nuts" and is used on a breakfast food. More specifically, it is contended by the respondent that this mark is misde-criptive or deceptive because the goods on which it is used contains no nuts or grapes or products of the same. This question must be determined solely by the significance that this mark has to the purchasers of the goods of the petitioner. There is no evidence whatever to show that to them it has this significance and the nature of the goods is believed to require the production of such evidence. This contention of the respondent is based solely on an etymological study of the expression "Grape Nuts." That this study alone is unreliable for the purpose of disclosing the actual significance in use of any word, is disclosed by the following examples:

[fol. 124] There is no grape in grapefruit, nor bread in breadfruit. An alligator pear is not a pear and is not used by alligators. A sugar-plum is not a plum, nor is there any butter in butternuts, nor soda in soda-water. Monkey wrenches are neither made by, nor intended for the use of monkeys, and a railroad frog and a fishplate have no known relation to denizens of the water.

In none of these instances does a study of etymology afford a safe guide to the significance that these terms actually have to persons who use them. This contention of the respondent can not be taken seriously by the examiner.

In paragraph 5 the petitioner raises the issue of the right of the respondent to use the mark disclosed in its registration involved herein. It is contended by the petitioner that the notation as used by the respondent is misdescriptive or deceptive because the amount of figs and nuts contained in the cereal is relatively small. It appears that of figs there is 2½ per cent and of peanuts there is 2 per cent, making a total of 4½ per cent (See Zeiss, p. 52, of respondent's record). The petitioner has filed no evidence to show that it has any deceptive significance to the purchasers of respondent's product. The examiner can not undertake to pose as an expert but he has no reason to believe that 4½ per cent of figs and nuts are not sufficient in quantity to give to these ingredients a value as a flavor, a dietetic, or a therapeutic agent. It is noted that on the printed matter found in the respondent's labels the following statement appears: "The food with the nut flavor." If the figs and nuts used in the respondent's product serve nothing more than to give a flavor thereto, they perform a utilitarian function. The latter gives the respondent a right to use the notation Fig-Nuts (William Rigley, Jr., & Co., v. Grove Co. et al., 183 Fed. Rep., 99; ex parte C. Shenkberg Co., 132 O. G., 1073). It is therefore, held that the respondent has a right to use the notation Fig-Nuts.

In paragraph 5 of the petition it is urged that the resemblance of the marks used by the parties is such that confusion in trade would

be likely. At common law, however, since the respondent has a right to use the notation Fig-Nuts this question of resemblance affords no proper basis for legal damage, regardless of the question whether confusion in trade would or would not be likely—

Hygienic Fleeced Underwear Co. v. Way, 137 Fed. Rep., 592.

John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. Rep., 574.

Sheffield King Milling Co. v. Theopold-Reid Co., 284 O. G., 381; — App. D. C., —; 269 Fed. Rep., 716.

It is believed, however, confusion in trade would not be likely. With the average purchaser confusion in trade is primarily a question of fact. In the last analysis this turns on whether such purchaser actually relies on the differences or the resemblances. Otherwise stated, it is the significance that the symbol has to the purchaser and not the preponderance of either the resemblances or the [fol. 125] differences which determines whether confusion in trade is likely to result (William A. Rogers, Ltd., v. International Silver Co., 129 O. G., 3503; 30 App. D. C., 97).

In the marks under consideration the only common feature is the word nut, and this feature, as used by the petitioner in connection with its goods is fanciful as is the word nut in the expression doughnut. On the other hand, as used by the respondent on its goods, the word nut has a utilitarian significance, pointed out above, similar to that which it has in the word chestnut. The examiner therefore believes that the significance of the word nut in these marks to the average purchaser is so different that there is no more likelihood of confusion in trade there-between than would be in the case of "doughnuts" and "chestnuts." In this respect this case is differentiated from the ruling found in the case of Postum Cereal Co., Ltd., v. Hillis, 123 MS. Dec., 41, relied upon by the petitioner. In this last mentioned case the word nuts in the mark "Bran-Nuts" on the goods used by Hillis had a fanciful and arbitrary significance, as does the word nuts as used by the petitioner in the notation Grape Nuts. The ruling in this last case is therefore deemed not to be persuasive nor controlling here.

In paragraph 5 of the petition it is also urged that the respondent is not entitled to the exclusive use of the notation Fig-Nuts. The fact that the exclusive use of such a symbol would be deemed at common law to be a restriction on the rights of others does not prevent the legislature from conferring on a trader such right to the exclusive use thereof for the purpose of indicating origin (Thaddeus Davids Company v. Davids and Davids, Trading as Davids Manufacturing Company, 202 O. G., 952; 233 U. S., 461). The obiter found in this latter case points out the inherent difficulty involved in construing rights so conferred. The Court of Appeals of the District of Columbia, in the case of Tim & Co. v. Cluet, Peabody & Co. (203 O. G., 306; 42 App. D. C., 212) has interpreted this right to the exclusive use to be limited solely to the purpose of indicating origin.

There is no express language in the Act of March 19, 1920, to indicate that a registration should have the significance as evidence which section 16 of the Act of February 20, 1905 states that a registration under the latter act shall have. Every consideration known to the examiner however makes it seem to him that a registration under the Act of March 19, 1920, cannot well be less than prima facie evidence of ownership of the mark for the purpose of indicating origin.

It is seemingly not claimed by the petitioner that the notation Grape-Nuts is "identical" with the mark disclosed in the registration involved herein within the meaning of paragraph (b) of the Act of March 19, 1920. In any event, it is held that it is not so identical. Therefore the mark relied upon by the petitioner could not bar the registration obtained by the respondent. If it could not so bar this registration thereunder then it would seem to the examiner that prior use thereof by the petitioner can not well be made the basis for a ruling by this Office that the respondent "was not entitled to the [fol. 126] exclusive use of the mark" within the meaning of the first ground of Section 2 of the Act of March 19, 1920. These considerations seem to exhaust all of the grounds specified in paragraph 5 of the petition on which injury is predicated by the petitioner.

In view of the conclusions hereinbefore stated in connection therewith, it is held that it does not appear that the petitioner is injured, within the meaning of Section 2, by the registration sought to be canceled.

Accordingly the petition is dismissed, and it is recommended that the registration be not canceled.

Limit of appeal: June 1, 1922.

J. Carnes, Examiner of Interferences.

May 12, 1922

Docket Division,
May 25, 1922,
U. S. Patent Office.

$15 Rec'd May 25, 1922. G. C. C., U. S. Pat. Office.

Canc. 666—37

Doc.

In the United States Patent Office

Cancellation #666

Postum Cereal Company, Inc.,

vs.

California Fig Nut Company.

Appeal

Appeal is hereby taken to the Commissioner of Patents in person from the decision of the Examiner of Interferences rendered May 12,

1922, dismissing the petition for cancellation herein and recommending that the registration of the California Fig Nut Company be not canceled.

The following are assigned as reasons of appeal:

(1) That the Examiner erred in dismissing the petition for cancellation.

(2) That the Examiner erred in failing to sustain the petition for cancellation.

(3) That the Examiner erred in failing to recommend that the registration of the California Fig Nut Company be canceled.

(4) That the Examiner erred in failing to hold that the mark Fig-Nuts used by California Fig Nut Company so nearly resembles the registered and known trade mark Grape Nuts owned and in use by Postum Cereal Company, Inc. and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion [fol. 127] or mistake in the mind of the public or to deceive purchasers.

(5) That the Examiner erred in failing to hold that the California Fig Nut Company was not entitled to the exclusive use of the alleged trade mark Fig Nuts at the time of its application for registration thereof.

(6) The Examiner erred in failing to hold that the California Fig Nuts Company was not entitled to the exclusive use of the mark "Fig Nuts" since the date of its application for registration thereof.

(7) The Examiner erred in failing to hold that the mark "Fig Nuts" registered by the California Fig Nuts Company is descriptive.

(8) The Examiner having held that the name Fig Nuts registered by California Fig Nuts Company is descriptive erred in failing to hold that by reason thereof such mark may not be registered.

(9) The Examiner erred in failing to hold that since paragraph (b) of Section 5 of the Act of Feb. 20, 1905 is incorporated by reference in Section (b) of the Act of March 19, 1920, and under paragraph (b) of the Act of February 20, 1905 a mark consisting "merely in words or devices which are descriptive of the goods with which they are used, or of the kind or quality of such goods," may not be registered under said Act of March 19, 1920.

An oral hearing is requested.

Appeal fee of $15.00 is filed herewith.

Respectfully, Edward S. Rogers, F. L. Browne, Attorneys for Postum Cereal Company, Inc.

Docket Clerk,
U. S. Patent Office.
Feb. 26, 1923.

Recorded, Vol. 142, P. 420.

Can. 666—46

Hearing: January 15, 1923.

IN THE UNITED STATES PATENT OFFICE

Cancellation Proceeding No. 666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY.

Appeal from Examiner of Interferences

Trade-mark for Breakfast Cereals

Trade-mark of California Fig Nut Company registered Jan. 18, 1921, No. 139,066.

[fol. 128] Mr. Frank F. Reed and Edward S. Rogers and Mr. Francis L. Browne for Postum Cereal Company, Inc.

Mr. Arthur E. Wallace for California Fig Nut Company.

The Postum Cereal Company, Inc., owner of the mark "Grape Nuts," as applied to a cereal, has, by its counsel, brought a petition, under the provisions of Section 2 of the Trade-Mark Act of March 19, 1920, praying the cancellation of the mark "Fig Nuts," used with a pictorial representation of figs and peanuts, registered by the California Fig Nut Company, and applied to a cereal.

The examiner of trade-mark interferences decided the petitioner corporation is not injured, within the meaning of Section 2 of the Act, and dismissed the petition. From this holding, appeal has been taken.

Respondent admits that the petitioner is the owner of the mark "Grape Nuts" applied to a cereal breakfast food, and has used this mark upon the packages containing its products, and has continued without interruption for several years, this use in interstate and foreign commerce. There is no dispute as to the wide use of this name throughout this country and in some foreign countries. It is also admitted by respondent that petitioner has caused this mark to be widely and favorably known, and to constitute a valuable asset of petitioner's business.

The points raised in this appeal involve some necessary interpretations of the Act of March 19, 1920, under which respondent registered its mark, but it is thought unnecessary to enter into an elaborate discussion of this Act in order to determine the case at bar. It will be sufficient, however, to note that unless and until this Act has

been differently construed by a court of competent jurisdiction, the following construction upon the Act is warranted:

First, the Act was intended for the relief of those parties who wished to avail themselves of registration in those countries which were members of the Convention held at Buenos Aires, August 20, 1910, but who were unable to register their marks under the 1905 Act as amended. Second, under this Act of 1920, descriptive marks are not prohibited registration. Third, the proviso clause of Section 1 (b), should be construed to read—

"Provided, That trade-marks which are so nearly identical with a known trade-mark * * * as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be placed on the register."

Fourth, the word "exclusive" found in Section 2 of Act is intended to state a necessary condition to registration, under the one year clause, of marks of the character there specified. In connection with the construction of the Act, attention is invited to the opinion of the Solicitor of the Department of the Interior, quoted in 277 O. G., 181; C. D., 1920, p. 89.

In connection with this view, the statement of Justice Robb of the Court of Appeals, District of Columbia, in the case of Charles R. Long Jr. Company (280 Fed. Rep. 975, 303 O. G., 398), has not been [fol. 129] overlooked. In that case the mark was sought to be registered under the February 1905 Act, as amended, and the paragraph of the opinion referring to the March 1920 Act was in the nature of an obiter dictum, and was not necessary to the decision of the issue before the Court. With this interpretation of the Act, a finding as to the points raised in the appeal will not be difficult.

Respondent contends that the petitioner is not the owner of a valid trade-mark because the mark is deceptive by reason of it being applied to a food which contains neither grapes nor nuts. After pointing out various instances where the name "grape" and the name "nut" have been applied to products possessing neither grapes nor nuts, the examiner of trade-mark interferences came to the conclusion that petitioner's mark was fanciful and had become recognized as a mark indicating the particular breakfast food, to the containers of which the mark was applied, and that there was nothing deceptive, within the meaning of the Statute, in using such a mark. This conclusion is believed to be sound. There is no natural product known as a "grape nut." The bringing together of the two words does not result in terms which describe any product known prior to the use of the mark by petitioner. The public have been taught, by the wide publicity given to petitioner's mark, to associate the mark with the particular kind of goods, and it is not thought there is any merit in the contention of respondent that petitioner's mark is deceptive. (Coca-Cola v. Koke Co. of America, 254 U. S. 143.)

Petitioner has contended that respondent's mark is deceptive, by reason of the small percentage of figs and nuts included in the compound. As well set forth by the examiner, it would appear but a fair interpretation to hold that four and one-half per cent of these two materials, figs and nuts, would be sufficient to justify the use of

these terms and render them descriptive, rather than deceptive. Even if there is no difference in taste, by reason of the presence of the fig and nut ingredients, there is reason to hold the flavor may be affected by such ingredients and, as noted by the examiner, this is sufficient to support the respondent's right to use these terms comprising the mark. In view of the construction of the Act under which respondent registered the mark, as above noted, there is no objection to the registration by reason of the mark being descriptive.

With the disposition of the appeal which seems to me justified, it is unnecessary to state whether the respondent is entitled to maintain his mark because it is descriptive, without reference to whether there is damage to petitioner. There is considerable confusion in adjudicated cases, where each mark alleged to be in conflict is a two-word mark. Where the two words of a mark are equally important and unusual, courts have frequently, although not uniformly, held that if the first word of each of the two marks is the same, the marks infringe: see the case of Griggs, Cooper & Co. v. Federal Coffee Mills Co. (240 O. G., 338; 46 App. D. C., 317), in which "Home Pride" was held to infringe "Home Brand"; also the case of Nabziger v. [fol. 130] Schulz Baking Co. (240 O. G., 941; 46 App. D. C. 292), in which "Butter-Cream" was held to infringe "Butter-Nut" and "Butter-Krust". In instances where each of the two marks had the first words dissimilar, and the second words similar, and these first words were the more distinctive words, infringement has frequently been held lacking. A recent case is that decided by the Court of Appeals, District of Columbia (307 O. G., 235) Stephen L. Bartlett Company v. Arbuckle Brothers, where the marks "Havesome" and "Drinksum" were held not deceptively similar; see also Valvoline Oil Co. v. Havoline Oil Co. (211 F. R., 189), where "Valvoline" was held not to infringe "Havoline". In the Coca-Cola Company cases, cited by petitoner, there does not appear to be an instance which is persuasive in the present case. The distinction between the registered mark and the mark of the infringers would seem to have been less than in the instant case. Without discussing the various cited cases further, it would seem a fair conclusion that the two marks are not so nearly similar as to cause confusion in the trade. The word "nut," common to both marks, is the less conspicuous word, is the second word, not so striking as the first word of each mark, and not so likely to be retained in the mind of the purchaser as is the first word of each two-word mark. The first words being wholly dissimilar in spelling, sound, appearance, and significance, it would appear there is not any probability of confusion in the minds of average purchasers. There does not appear to have been submitted any proof of actual confusion. It would seem, therefore, that the petitioner has not shown damage under the section of the Act.

The decision of the examiner of trade-mark interferences is affirmed.

Wm. A. Kinnan, First Assistant Commissioner.

February 26, 1923.

Docket Division,
Mar. 26, 1923,
U. S. Patent Office.

Canc. 666—47

IN THE UNITED STATES PATENT OFFICE

Cancellation #666

POSTUM CEREAL COMPANY, INC.,

vs.

CALIFORNIA FIG NUT COMPANY.

APPEAL

Now comes Postum Cereal Company, Inc., a corporation of Delaware, of Wilmington, Delaware, and Battle Creek, Michigan, by [fol. 131] Frank F. Reed and Edward S. Rogers, its attorneys, and gives notice to the Commissioner of Patents of its appeal to the Court of Appeals of the District of Columbia, from the decision of the First Assistant Commissioner of Patents, rendered February 26, 1923, dismissing the petition for cancellation in the above-entitled case, and, as reasons of appeal, assigns the following errors:

The First Assistant Commissioner of Patents erred in the following particulars:

1. In refusing to follow the decision of this court in the case of Charles R. Long, Jr. Company, 280 Fed. 975, 303 O. G. 398, that descriptive marks are not registrable under the act of March 19, 1920.

2. In holding that the decision of this court in the case of Charles R. Long, Jr., so deciding was obiter dictum and not binding upon him.

3. In holding that under the act of March 19, 1920, descriptive marks are not prohibited registration.

4. Having held the word Fig Nuts, registered by respondent, to be descriptive, erred in refusing to decide that its registration is prohibited under the act of March 19, 1920.

5. In holding that the act of March 19, 1920, was intended for the relief of those parties who wished to avail themselves of registration in those countries which were members of the Convention held at Buenos Ayres August 20, 1910, but who were unable to register their marks under the act of 1905 as amended.

6. In holding that the proviso clause of Section 1B should be construed to read:

"Provided, That trade-marks which are so nearly identically with a known trade-mark * * * as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be placed on this register."

7. In holding that the word "exclusive" found in Section 2 of the Act is intended to state a necessary condition to registration under the one year clause, of marks of the character there specified.

8. In holding that respondent has a right to use the name Fig Nuts because such name is descriptive of its goods.

9. In holding that descriptiveness is no objection to registration under the act of March 19, 1920.

10. In failing to hold that the alleged small percentage of figs and nuts contained in respondent's product was a mere device to obtain a colorable right to use the name Fig Nuts.

11. In failing to hold that respondent's alleged mark Fig Nuts is a colorable imitation of petitioner's mark Grape Nuts.

12. In failing to hold that the mark Fig Nuts used by respondent so nearly resembles the registered and known trade-mark Grape Nuts owned and in use by petitioner and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers.

13. In dismissing the petition for cancellation.

[fol. 132] 14. In failing to sustain the petition for cancellation.

15. In failing to hold that the registration of the California Fig Nut Company be cancelled.

Postum Cereal Company, Inc., by Frank F. Reed, Edward S. Rogers, F. L. Browne, Attorneys.

Endorsed on cover: Commissioner of Patents. Patent Appeal Docket, No. 1621. Postum Cereal Company, Inc., appellant, vs. California Fig Nut Company. Court of Appeals, District of Columbia. Filed May 7, 1923. Henry W. Hodges, Clerk.

[fol. 133] In Court of Appeals of District of Columbia

No. 1621

Postum Cereal Company, Inc., Appellant,

vs.

California Fig Nut Company

Submission of Cause—March 10th, A. D. 1924

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Mr. E. S. Rogers, attorney for the appellant, and by Mr. A. E. Wallace, attorney for the appellee.

[fol. 134] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

(Before Smyth, Chief Justice, and Robb and Van Orsdel, Associate Justices)

OPINION

Mr. Justice Robb delivered the opinion of the court:

Appellee secured registration of the mark "Fig-Nuts" under the provisions of the Trademark Act of March 19, 1920. (41 Stat. 533), and in this proceeding, based upon Section 2 of that Act, it is sought to cancel the registration.

In U. S. Compression Inner Tube Co. vs. Climax Rubber Co., 53 App., D. C., 370, (290 Fed. 345), we ruled that the Act in question contains no provision for appeal to this court, and hence that we are without jurisdiction to consider one.

It results that this appeal must be and is dismissed for want of jurisdiction.

Dismissed.

[fol. 135] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

Cancellation No. 666

[Title omitted]

JUDGMENT—April 7, 1924

Subject Matter: Trademark for Breakfast Cereals

Appeal from the Commissioners of Patents

This cause came on to be heard on the transcript of the record from the Commissioner of Patents and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that this appeal must be, and the same is hereby, dismissed for want of jurisdiction.

Per Mr. Justice Robb.

[fol. 136] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR APPEAL— Filed June 27, 1924

Comes now petitioner, Postum Cereal Company, Inc., appellant in the above entitled cause, and shows unto the court that on the

seventh day of April, 1924, a certain order and judgment was entered herein to its damage and prejudice and certain errors were committed, as will appear from the assignment of error filed herewith.

Your petitioner further shows that the decree of the Court of Appeals herein is subject to review by the Supreme Court of the United States under the provisions of Section 250 of the Judicial Code.

Wherefore, petitioner prays the allowance of the appeal to the Supreme Court of the United States for the correction of the errors complained of and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the said Supreme Court and that any bond for costs be fixed in a nominal sum.

Postum Cereal Company, Inc., Appellant, by Edward S. Rogers, Attorney.

[File endorsement omitted]

[fol. 137] In Court of Appeals of District of Columbia

[Title omitted]

Assignment of Error—Filed June 27, 1924

Now comes Postum Cereal Company, Inc., appellant herein, and says that in the record and proceedings of the Court of Appeals in the above entitled cause, and in the rendition of the final order and decree therein, manifest error has intervened, to the prejudice of said appellant in this, to wit:

1. The court erred in dismissing the appeal from the Commissioner of Patents herein for want of jurisdiction;

2. The court erred in not holding that it had jurisdiction of the appeal from the Commissioner of Patents.

Postum Cereal Company, Inc., Appellant, by Edward S. Rogers, Attorney.

[File endorsement omitted]

[fol. 138] In Court of Appeals of District of Columbia

[Title omitted]

Order Allowing Appeal—July 1, 1924

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is ordered by the Court that said appeal be, and the same is

hereby, allowed, and the bond for costs or cash deposit in lieu thereof is fixed at the sum of Three Hundred Dollars ($300.00).

[fol. 139] MEMORANDUM

July 1, 1924.—$300.00 deposited with clerk in lieu of bond.

[fol. 140] CITATION—In usual form showing service on Arthur E. Wallace; omitted in printing

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[fol. 141] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 140 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Postum Cereal Company, Inc., appellant, vs. California Fig Nut Company, No. 1621 Patent Appeal Docket, April term, 1924, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 1st day of July, A. D. 1924.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal of the Court of Appeals, District of Columbia.)

Endorsed on Cover: File No. 30,462. District of Columbia Court of Appeals. Term No. 121. Postum Cereal Company, Incorporated, appellant, vs. California Fig Nut Company. Filed July 1st, 1924. File No. 30,462.

(6873)

DENIED Oct 20 1925

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. 4[redacted]61 22

POSTUM CEREAL COMPANY, INC.,
PETITIONER,

v.

CALIFORNIA FIG-NUT COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FRANK F. REED,
EDWARD S. ROGERS,
WM. J. HEBERER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No.

POSTUM CEREAL COMPANY, INC.,
PETITIONER,

v.

CALIFORNIA FIG-NUT COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Postum Cereal Company, Inc., submits its petition for a writ of certiorari to the Court of Appeals of the District of Columbia to review a decision of that court in the above-entitled cause.

The Question Involved.

The sole question is whether the Court of Appeals, under the Trade-mark Act of March 19, 1920, has jurisdiction to review a decision of the Commissioner of Patents denying a petition to cancel the registration of a trade-mark.

The Facts.

This proceeding was instituted by a petition in the United States Patent Office under the Trade-mark Act of March 19, 1920 (41 Stat. 533) to cancel the registration of the word "Fig-Nuts" as a trade-mark for a breakfast cereal, on the ground that "Fig-Nuts" infringes petitioner's well known and valuable trade-mark "Grape-Nuts," long previously owned, in use, and registered by petitioner as a trade-mark for similar merchandise.

Answer was filed and testimony taken. The petition was dismissed by the Commissioner of Patents and a petition for rehearing denied. From the decision of the Commissioner, an appeal was taken to the Court of Appeals.

The Decision Below.

The appeal to the Court of Appeals was dismissed, the court holding that it had no jurisdiction to entertain an appeal from the Commissioner of

Patents in a trade-mark case arising under the Trade-Mark Act of March 19, 1920.

The Court of Appeals followed its decision in *United States Compression Inner Tube Co.* v. *Climax Rubber Co.* (53 App. D. C. 370; 290 F. R. 345). In that case it held that as the enumeration in Section 6 of the Act of 1920, of various sections of the Act of 1905, "made applicable to marks placed on the register provided for by Section 1 of this act" *omitted Section 9* of the Act of 1905, and as Section 9 related to appeals from the Commissioner of Patents to the Court of Appeals, no right of appeal is now given by this statute.

The Statutes Involved.

The statutes involved are Section 1 (*b*) of the Trade-mark Act of March 19, 1920 (41 Stat. 533), which is as follows:

> "That trade-marks which are identical with a known trade-mark owned and used in interstate and foreign commerce, or commerce with the Indian tribes, by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be placed on this register."

Section 6 of the same act, which reads:

> "That the provisions of sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, and 28 (as to

class (*b*) marks only) of the Act approved February 20, 1905, entitled 'An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with Indian tribes, and to protect the same,' as amended to date, and the provisions of section 2 of the Act entitled 'An Act to amend the laws of the United States relating to the registration of trade-marks,' approved May 4, 1906, are hereby made applicable to marks placed on the register provided for by section 1 of this Act;"

and Section 9 of the Act of February 20, 1905 (33 Stat. 727), which reads:

"That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

Reasons for Granting the Writ.

(1) Certiorari is the proper method, in the opinion of counsel, by which the question of jurisdiction involved can be determined, and it is the first time it has come before this court. Out of abundance of caution, however, application for an appeal has also been made.

(2) It necessarily results from the decision of the Court of Appeals that (as hereinafter shown), judicial review of the decision of the Commissioner of Patents cannot be had under Section 4915 of the Revised Statutes, or otherwise.

(3) In the very important class of trade-mark cases like the present, there exists, under the decision sought to be reviewed, a *hiatus* in the law—that is, there is no means provided by which parties to proceedings to cancel the registration of trademarks under the Act of March 19, 1920, can obtain judicial review of the decisions of the Commissioner of Patents—the only cases in which the decision of an administrative or quasi judicial officer is not subject to review by *any* court, and is a departure from a settled policy of long standing.

(4) The court held that the right of appeal was abolished by implication, contrary to the rule laid down by this court in *Craig* v. *Hecht,* 263 U. S. 255, discussed *infra.*

Wherefore, petitioner prays that a writ of certiorari issue to the Court of Appeals of the District of Columbia to review its decree in the cause.

Counsel for petitioner are authorized to say that while opposing counsel of course does not agree that either the action of the Commissioner of Patents or of the Court of Appeals is erroneous, he regards the question whether the Court of Appeals has jurisdiction over decisions of the Commissioner of Patents in trade-mark cases arising under the Act of March 19, 1920, as of great public importance in the administration of the trade-mark laws, and sufficient, as petitioner submits, to justify review by this Court.

Respectfully,

POSTUM CEREAL CO., INC.,
By JOHN S. PRESCOTT,
Secretary.

STATE OF NEW YORK,
County of New York, ss:

Comes now John S. Prescott, and being duly sworn deposes and says that he is the secretary of the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is not made by

petitioner is that the petitioner is a corporation; that as to all matters not stated on affiant's own knowledge, the source of his information and the grounds of his belief are the records and papers of the petitioner in affiant's possession and control.

JOHN S. PRESCOTT.

Sworn to before me this 28th day of June, 1924.

BELLA STAATS TOBISON,
Notary Public.

[SEAL.]

We hereby certify that we have examined and read the foregoing petition for a writ of certiorari and that in our opinion such petition is well founded and should be granted by this Court, and that such petition is not filed for delay.

FRANK F. REED.
EDWARD S. ROGERS.

WM. J. HUGHES,
Of Counsel.

JUNE, 1924.

BRIEF IN SUPPORT OF PETITION.

I.

The question whether the Court of Appeals of the District of Columbia has jurisdiction to review decisions of the Commissioner of Patents in proceedings to cancel the registration of trade-marks under the Act of March 19, 1920, is even broader than hereinbefore stated, because, from the decision of that court in the instant case, it necessarily follows that the decision of the Commissioner is not subject to review in *any* court. This is so because Section 9 of the Act of 1905 specifies the *only* means by which decisions of the Commissioner may be reviewed—that is by appeal to the Court of Appeals, (or by a proceeding under R. S. U. S. 4915). This Court held in *American Steel Foundries* v. *Robertson* (262 U. S. 209), that Section 4915 of the Revised Statutes, authorizing the filing of a bill to review decisions of the Commissioner of Patents in *patent* cases, applied also in *trade-mark* cases under the Act of 1905, following *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35; *Atkins & Co.* v. *Moore*, 212 U. S. 285; *Gaines* v. *Knecht*, 212 U. S. 561. This view was reaffirmed as recently as May 26, 1924, in *The Baldwin Company* v. *Robertson* (No. 251, October Term, 1923). If the Act of 1905 is *superseded* by the Act of 1920, and if the latter Act has not had carried into it the provision of the earlier

act upon which the right conferred by Section 4915, R. S., rested, it follows that bills in equity will not lie in such cases, and there is no way to obtain judicial review of a decision of the Commissioner of Patents in any trade-mark case. And manifestly, if the decision below be correct, a bill under R. S. U. S. 4915, will not lie in cases arising under the Act of 1920, because the basis of such a proceeding is found, not in that act, but in Section 9 of the Act of 1905. It follows then that parties to such proceedings are deprived of all access to the courts.

II.

The Court of Appeals by its decision in the instant case has held, in substance, that Congress has by *implication* taken away a right of appeal which has always existed heretofore in cases like this.

The analogy between trade-mark cases and patent cases has been observed by this Court in *American Steel Foundries* v. *Robertson* (262 U. S. 209), where Mr. Chief Justice Taft said:

> It is obvious from that Section and the whole of the Trade-mark Act that Congress intended to produce a parallelism in the mode of securing these two kinds of Government monopolies from the Patent Office.

This parallelism must, we think, be considered in determining the intent of Congress. It seems to have been lost sight of by the Court of Appeals. It appears to us that that court should not have been

satisfied with an inference as a basis for holding that Congress intended to take away a right of appeal, which has been the common practice in like cases for many years.

In this connection the language of this Court in *Craig* v. *Hecht* (263 U. S. 255), is appropriate:

> If it (Congress) had intended to abolish the right of appeal * * * it would doubtless have done so in plain and direct terms. The fact that the right of appeal was not thus abolished furnishes a persuasive inference that Congress intended to designate a court to hear and determine such appeals.

The Court of Appeals of the District of Columbia has been the court which, since its organization, has been designated by Congress to hear and determine appeals from decisions of the Commissioner of Patents. It is submitted that it was the intention of Congress, in giving effect to the Argentine Conference, to make the Act of March 19, 1920, *a supplement to*, and not *a substitute for*, the Act of February 20, 1905. The cases arising under the Act of 1920 are numerous. The rights and interests involved are important. An intention to make such a far-reaching change in policy affecting enormously valuable rights should not be imputed to Congress unless such intention is clear. The right of the citizen to have review in the courts of the action of administrative and *quasi-judicial* officers should be maintained unless Congress has clearly

shown an intention to the contrary, and this, we submit, it has not done.

FRANK F. REED.
EDWARD S. ROGERS.

WM. J. HUGHES,
Of Counsel.

JUNE —, 1924.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 22.

POSTUM CEREAL COMPANY, INC., APPELLANT,

vs.

CALIFORNIA FIG-NUT COMPANY, APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

EDWARD S. ROGERS,
ALLEN M. REED,
JOHN S. PRESCOTT,
Attorneys for Petitioner.

WM. J. HUGHES,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 22.

POSTUM CEREAL COMPANY, INC., APPELLANT,

vs.

CALIFORNIA FIG-NUT COMPANY, APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

This is an appeal from a decision of the Court of Appeals of the District of Columbia dismissing for want of jurisdiction an appeal from a decision of the Commissioner of Patents in a trade-mark case arising under the Act of Congress of March 19, 1920.

Opinion of the Court of Appeals.

The opinion of the Court of Appeals is reported in 297 Fed., 544. It also appears in the record at page 79.

Jurisdiction of this Court.

The judgment of the Court of Appeals was entered on April 7, 1924 (R., 79). An appeal was allowed to this Court on July 1, 1924 (R., 80), under section 250 of the Judicial Code (since repealed by the Act of February 13, 1925 (43 Stat., 936, 941).

The Question Involved.

The sole question is whether the Court of Appeals, under the Trade-Mark Act of March 19, 1920 (41 Stat., 533), has jurisdiction to review a decision of the Commissioner of Patents.

The Facts.

This proceeding was instituted by a petition in the United States Patent Office under the Trade-Mark Act of March 19, 1920 (41 Stat., 533), to cancel the registration of the word "Fig-Nuts" as a trade mark for a breakfast cereal. The petition averred that the name "Fig-Nuts" infringes appellant's well-known and valuable trade-mark "Grape-Nuts," long previously owned, in use and registered by appellant as a trade-mark for merchandise indistinguishable in appearance. The circumstances of the adoption of the

name "Fig-Nuts" indicate a thinly disguised purpose to benefit by the wide sale and extensive advertising of "Grape-Nuts," in the unnecessary resemblance between the two marks and in the application of the words "Fig-Nuts" to a breakfast cereal composed essentially of flour and bran.

Answer was filed and testimony taken. The petition was dismissed by the Commissioner of Patents and a petition for rehearing denied. From the decision of the Commissioner an appeal was taken to the Court of Appeals. As only a question of law is involved, no discussion of the facts will be attempted.

The Decision Below.

The appeal to the Court of Appeals was dismissed, the court holding that it had no jurisdiction to entertain an appeal from the Commissioner of Patents in a trade-mark case arising under the Trade-Mark Act of March 19, 1920 (R., 79).

The Court of Appeals followed its decision in *United States Compression Inner Tube Co.* v. *Climax Rubber Co.* (53 App. D. C., 370; 290 Fed., 345). In that case it held that as the enumeration in section 6 of the Act of 1920 of various sections of the Trade-Mark Act of 1905, "made applicable to marks placed on the register provided for by section 1 of this act," *omitted section* 9 of the Act of 1905, and as section 9 related to appeals from the Commissioner of Patents to the Court of Appeals, no right of appeal is now given by this statute; in other words, that the right to an appeal was repealed by implication.

The Issue.

It is plain from the above that there is no question before this Court as to the correctness of the decision of the Commissioner of Patents, or whether that decision was ministerial or judicial. Prior to the Act of 1920 his decision, whichever it was, was reviewable by the Court of Appeals of the District of Columbia under section 9 of the Trade-Mark Act of February 20, 1905. Congress in that act specifically gave a right of review, and that right has been frequently exercised. The only question here is whether the jurisdiction thus conferred has been taken away by implication by the Act of March 19, 1920, as to cases arising under that act.

The question is a serious one, not only in this case but generally, for if the right of judicial review conferred and exercised by the Court of Appeals under the Act of 1905 has been taken away by the Act of 1920, there is now no review, *in any court*, of the decisions of the Commissioner of Patents in any trade-mark case under the Act of 1920 originating in the Patent Office.

The result of the decision below is that parties to such proceedings have no means of obtaining any judicial determination of the important questions of law and fact which are constantly arising in these cases which involve valuable trade-mark rights both in the United States and in foreign countries.

It has been the settled policy of the patent and trade-

mark laws to provide a means to review cases originating in the Patent Office, so that the terms of the statutes, often obscure, can be interpreted and clarified, and not to compel litigants to submit to administrative Government officers the final determination of important legal rights.

The Statutes Involved.

The statutes involved are section 1 (*b*) and section 6 of the Trade-Mark Act of March 19, 1920 (41 Stat., 533), which are as follows:

> "Sec. 1 (*b*). * * * That trade-marks which are identical with a known trade-mark owned and used in interstate and foreign commerce, or commerce with the Indian tribes, by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be placed on this register.
>
> "Sec. 6. That the provisions of sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 28 (as to class (*b*) marks only) of the Act approved February 20, 1905, entitled 'An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with the Indian tribes, and to protect the same,' as amended to date, and the provisions of section 2 of the Act entitled 'An Act to amend the laws of the United States relating to the registration of trade-marks,' approved May 4, 1906, are hereby made applicable to marks placed on the register provided for by section 1 of this Act; * * *"

And section 9 of the Act of February 20, 1905 (33 Stat., 727), which reads:

> "That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

Synopsis of Argument.

I. The decree of the Court of Appeals dismissing the appeal for want of jurisdiction is a final decree, capable of review by this Court.

II. The jurisdiction of the Court of Appeals under the Act of 1905 was not divested by the Act of 1920 by implication.

III. The reasoning of the Court of Appeals would compel the conclusion that practically the whole Trade-Mark Act of 1905 was repealed by the Act of 1920, and would result in a complete breakdown of the existing trade-mark practice.

IV. The decree of the Court of Appeals would deny to registrants of trade-marks any relief from erroneous decisions of the Patent Office.

ARGUMENT.

I.

The Decree of the Court of Appeals Dismissing the Appeal for Want of Jurisdiction is a Final Decree Capable of Review by this Court on Appeal.

The duty to this Court of counsel for appellant requires them in candor to say that they have been of the opinion that certiorari was the proper means by which the question of jurisdiction herein involved could be determined, and that because a contrary view had been urged, namely, that this Court had jurisdiction under section 250 of the Judicial Code, an appeal was taken. The petition for a writ of certiorari submitted herein was denied, however, by this Court on October 20, 1924.

But as this Court in its decision in the case of *The Baldwin Company* v. *Robertson*, 265 U. S., 168 (a case similar in many respects to the one at bar), denied a petition for certiorari therein submitted, and held that an appeal would lie from a decision of the Court of Appeals in a trade-mark cancellation proceeding, counsel feel that their duty to their client requires them to press the present appeal. Should the court be of opinion that the case is not properly before it on appeal, in view of the importance of the question involved, as will hereinafter appear, and the fact that this Court alone can determine it, counsel respectfully submit that the Court should rescind its order denying

the petition for a writ of certiorari, allow the writ and review the decision below.

In the case of *Security Trust Co.* v. *Dent*, 187 U. S., 237, this Court said (239):

> "The cause was then brought here by a writ of error. We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the Circuit Court of Appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari."

In this connection it is to be noted that the Court on October 26, 1925, granted a writ of certiorari in the case of *Federal Trade Commission, Petitioner*, v. *Alfred Klesner, etc.*, No. 211, October term, 1926, on the application of the Government. That case, like this, presents a question of the jurisdiction of the Court of Appeals.

Section 250 of the Judicial Code, in effect on the date of the decision appealed from in the present case, provided as follows:

> "Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal in the following cases:
>
> * * * * * * *

> "Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

As the decree of the Court of Appeals dismissed the appeal for want of jurisdiction (R., 79), it necessarily is a final decree. This Court so held in the case of *The Baldwin Company* v. *Robertson, supra,* citing *Shaffer* v. *Carter,* 252 U. S., 37, 44. The decrees of the Court of Appeals of the District of Columbia, which are *not* final, are the rulings which are *advisory* on the Patent Office. *This is not that kind of case.* When the Court construes a statute and holds that it has no jurisdiction thereunder to entertain an appeal and consider a case, such a decision is necessarily a final one. When the litigation is terminated and nothing remains to be done but to carry what has been decreed into execution, such a decree has always been held to be final for the purposes of an appeal. *Winthrop Iron Co.* v. *Meeker,* 109 U. S., 180, 183. A judgment is final for purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Mower* v. *Fletcher,* 114 U. S., 127; *Lodge* v. *Twell,* 135 U. S., 232.

In *Kingman & Co.* v. *Western Manufacturing Co.,* 170 U. S., 675; *Wetmore* v. *Rymer,* 169 U. S., 115; *Huntington* v. *Laidley,* 176 U. S., 668, 677, this Court held that the decision of a court dismissing a bill for want of statutory authority to entertain it, or other-

wise divesting itself of jurisdiction, is final and reviewable by this Court.

The decision of the Court of Appeals was based upon its construction of the Trade-Mark Act of March 19, 1920 (41 Stat., 533), made in *United States Compression Inner Tube Co.* v. *Climax Rubber Co.*, 53 App. D. C., 370; 290 Fed., 345. In that case it held that as section 6 of the Trade-Mark Act of 1920, in carrying over into that act certain sections of the Trade-Mark Act of February 20, 1905 (33 Stat., 727), *omitted* section 9, and as section 9 authorized appeals from the Commissioner of Patents to the Court of Appeals, there now exists no right of appeal in proceedings brought under the latter act. The construction of this law of the United States was necessarily brought in question by or on behalf of the defendant. It would seem, therefore, as in *The Baldwin Co.* v. *Robertson, supra*, that an appeal will lie from the Court of Appeals of the District of Columbia to this Court.

The only final judgments and decrees of the Court of Appeals of the District of Columbia *which may not be reviewed* on appeal or writ of error are those "arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." While the trade-mark laws are administered by the Commissioner of Patents, they are not "patent laws," and therefore the judgment complained of does not fall within the exceptions of section 250. No other conclusion can be reached, in view of the fact that this Court entertained the appeal in *The Baldwin Co.* v. *Robertson, supra*, which also presented for decision the

application of section 9 of the Trade-Mark Act of 1905. A trade-mark registration does not involve the validity of any patent or copyright. *South Carolina* v. *Seymour*, 153 U. S., 353, 358. The Act of January 28, 1915 (38 Stat., 804), amending section 128 of the Judicial Code, which provided, among other things, the classes of cases which should be final in the Circuit Court of Appeals by adding thereto cases "under the trade-mark laws," applied only to that court and did not affect cases in the Court of Appeals of the District of Columbia. On the other hand, this Court has reviewed trade-mark cases on certiorari under section 128 of the code now amended by the Act of February 13, 1925 (43 Stat., 936). See *Hutchinson, Pierce Co.* v. *Lowey*, 217 U. S., 457; *Street & Smith* v. *Atlas Mfg. Co.*, 231 U. S., 348.

II.

The Jurisdiction of the Court of Appeals under the Act of 1905 was not Divested by Implication by the Act of 1920.

To justify the decision of the Court of Appeals, it must appear that Section 9 of the Act of 1905 was *repealed* by Congress. This section is printed in the margin* with the relevant matter in italics. Appel-

* Sec. 9. *That if* an applicant for registration of a trade-mark or a party to an interference as to a trade-mark, or a party who has filed an opposition to the registration of a trade-mark, or *party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia*, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings as far as the same may be applicable.

lant comes within the letter of this provision. It is a party to a cancellation, dissatisfied with the decision of the Commissioner of Patents, and is therefore entitled to a review by the Court of Appeals unless this section has been repealed expressly or by implication. It has not been expressly repealed. Whether it was impliedly repealed requires a construction of the two Trade-Mark Acts of 1905 and 1920. The latter act, counsel submit, was a *supplementary* and not a *superseding* statute. It was designed for the purpose of giving effect to the Argentine Conference of August 20, 1910 (see preamble to 1920 Act), and not for the purpose of taking away any rights or remedies which American trade-mark registrants then had under the Act of 1905. An act which is intended to enlarge a right, or, as in the present case, to give right of registration to certain trade-marks not registrable under previously enacted statutes, cannot, it is submitted, reasonably be held restrictive.

This Court views with disfavor repeals of statutes by *implication* (*Craig* v. *Hecht*, 263 U. S., 255). As was held in *U. S.* v. *Levois*, 17 How., 85, repeals of statutes by implication are not favored, and are never admitted where the earlier can stand with the new act, but only where there is a positive repugnancy between the statutes, or the later is plainly intended as a substitute for the earlier. It is submitted that there is no such repugnancy between the acts of 1905 and 1920.

In construing statutes *in pari materia* of different dates, the later repeals the earlier only when there are express terms of repeal, or where the implication of

repeal is a necessary one. *Wilmot* v. *Mudge*, 103 U. S., 217. There is no such necessity for the repeal of section 9 of the Trade-Mark Act of 1905. This Court has held that where two statutes cover in whole or in part the same subject-matter, and are not wholly irreconcilable, no purpose to repeal being clearly expressed or indicated, effect is to be given to both. *U. S.* v. *Healey*, 160 U. S., 136, and *U. S.* v. *Greathouse*, 166 U. S., 601. Likewise it is necessary to a repeal by implication by a statute covering the whole subject-matter of a former one that the objects of the two statutes be the same. *U. S.* v. *Claflin*, 97 U. S., 546. Here the object of the Trade-Mark Act of 1920 was *not* to repeal the Act of 1905, *but to give effect* to the International Conference of August 20, 1910 (see preamble to 1920 Act).

Furthermore, this Court has held that a statute will not repeal a prior statute merely because it repeals some of its provisions and admits others, or adds new provisions; the later act operates as a repeal only when it plainly appears that it was intended as a substitute for the earlier act. *C. M. & St. P. R. Co.* v. *U. S.*, 127 U. S., 406, 408. Counsel respectfully submit that the Trade-Mark Act of 1920 is not a substitute for the Act of 1905, but that the later act merely supplements the earlier one. Both are now in practical operation in the Patent Office.

III.

The Reasoning of the Court of Appeals Would Compel the Conclusion that Practically the Whole Trade-Mark Act of 1905 was Repealed by the Act of 1920, and Would Result in a Complete Breakdown of the Existing Trade-Mark Practice.

The Act of March 19, 1920, contains no general repeal section, such as section 30 of the Act of February 20, 1905. If it is held that section 9 of the Act of 1905 has been repealed because it was not enumerated among the sections carried over into the Act of 1920 by section 6 thereof, it must necessarily be held that sections 1, 2, 3, 4, 5, 6, 7, 8, 10, part of 11, 12, 24 and 29 of the Act of 1905 have also been repealed by implication for the reason that, as will be demonstrated herein, they have not been expressly re-enacted or carried over into the Act of 1920.

Such a decision would mean that *no trade-marks may now* be registered under the Act of 1905. It would mean that there is no longer on our statute books any law relating to trade-mark practice in the Patent Office, since sections 1, 2, 3 and 4 of the Act of 1905 are the only statutory provisions relating to the requirements of applications for the registration of trade-marks. Sections 6, 7 and 8 of the Act of 1905 are the only statutes providing for the examination in the Patent Office of applications for the registration of trade-marks and for interference, opposition and cancellation proceedings therein.

If the doctrine of repeal by implication is applied

to the Trade-Mark Acts of 1905 and 1920, then section 10 of the Act of 1905 is no longer the law of the land and there is no authority for the recording of assignments of trade-marks, and if paragraph 1 of section 11 and section 12 have been repealed there is no authority for the issuance of certificates of registration. If the decision in this case is sustained, all rights secured by registration of trade-marks in the Patent Office will be destroyed, and those registered since the enactment of the Act of 1920 will be rendered of doubtful validity.

An examination of the Trade-Mark Act of 1920 will indicate that sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, par. 1, 12, 24 and 29 of the Act of 1905 have not been expressly carried over into it, and that the later act is in reality a supplementary statute.

Thus, section 1 of the Act of 1920 relates to the keeping of a register of (*a*) trade-marks communicated to the Commissioner of Patents by the international bureaus provided for by the Argentine Conference of August 20, 1910, and (*b*), with certain exceptions, trade-marks *not* registrable under the Act of February 20, 1905. As nothing is said respecting trade-marks *registrable* under the Act of 1905, it is obvious that Congress intended that they might still be registered and they actually are being registered. But if section 9 is held to have been repealed by implication, then those sections of the act designating what marks *are* registrable must also be held to have been repealed by implication.

Section 2 of the Act of 1920 is identical with section 13 of the Act of 1905.

Section 3 of the Act of 1920 relates to suits against persons using a false designation of origin of merchandise placed in foreign and interstate commerce.

Section 4 of the Act of 1920 is identical with section 16 of the Act of 1905.

Section 5 of the Act of 1920 provides for the publication of notice of registration by registrants of class (*a*), section 1 marks.

Section 6 provides for the application of certain provisions of the Act of 1905 to marks placed on the register by section 1 of the act. These provisions are sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 28 (as to class (*b*) marks only) of the Act of 1905.

Section 7 is identical with section 11, paragraph 2, of the Act of 1905.

Section 8 is identical with section 14, of the Act of 1905.

Section 9 provides for an amendment to section 5 of the Act of 1905. It is apparent that although that section of the Act of 1905 was not among those enumerated in section 6 of the later act, Congress did not intend to repeal it. It is not unreasonable, therefore, to assume also that Congress did not intend to repeal the other non-enumerated sections of the Act of 1905.

The latest edition of the rules of the Patent Office concerning the registration of trade-marks is that of November 1, 1925, copies of which are submitted herewith for the convenience of the Court. An examination of these rules indicates that the Patent Office still considers that trade-marks may be registered under the Act of February 20, 1905 and that the act is in other respects in full force and effect. Section 1 of the Act

of 1905 is cited as the authority for rules 16, 17, 19, 21, 22 and 36. Section 2 of the Act of 1905 is cited as the authority for rules 17, 31, 33 and 34. Section 3 of the Act of 1905 is the authority for rules 28 and 29. Section 4 of the Act of 1905 is given as the authority for rules 17, 27 and 73. Section 5 of the Act of 1905 is the authority for rules 19, 20 and 32. Section 6 is cited as the basis for rules 38, 40 and 56. Section 9 is the authority for rule 64. Section 10, for rules 76 and 77. Section 11, for rules 69, 78 and 79; and section 12 of the Act of 1905, for rules 70, 71 and 72.

It must therefore be concluded that Congress did not intend to repeal those sections of the Act of 1905. Is there any more reason to suppose that Congress intended to repeal section 9?

IV.

The Decree of the Court of Appeals Denies to Owners of Trade-Marks in Proceedings Involving Their Registration Any Relief from Erroneous Decisions of the Patent Office.

Much confusion exists at the bar today as to the scope and effect of the Act of March 19, 1920.

Should the construction of the Court of Appeals in this case be upheld, owners of trade-marks availing themselves of the Act of 1920, which was designed to foster foreign commerce, will have no relief from erroneous decisions of the Patent Office. This Court held, in *Baldwin Company* v. *Robertson*, *supra*, that a dissatisfied party to an application for the cancellation of the registration of a trade-mark is given a

remedy by bill in equity as provided for a defeated applicant for a patent in R. S. 4915. That right, however, will also be denied to the dissatisfied party to a cancellation proceeding if the decision in the present case is sustained, because if section 9 of the Act of 1905 providing for appeals is not applicable to cases arising under the Act of 1920, then there can be no proceeding under R. S. 4915, for the reason that it was section 9 of the Trade-Mark Act of 1905 which this Court held was the basis for the proceeding under section 4915 of the Revised Statutes. (*American Steel Foundries* v. *Robertson*, 262 U. S., 209; *Baldwin Co.* v. *Robertson, supra.*)

It must be apparent that the question presented is whether Congress intended that valuable and important trade-marks can be pirated with impunity under the forms of law, and the injured party denied access to any court. Yet this is the consequence of the decree below.

A colorable imitation of appellant's valuable trade-mark applied to indistinguishable merchandise was registered by the Patent Office upon an affidavit by appellee that it believed itself to be the owner, and that no other person, firm, corporation or association, to the best of its knowledge and belief, had the right to use this mark, and that it was in *bona fide* use not less than a year. An obvious simulation of appellant's trade-mark was thereupon allowed registration by the Patent Office. Appellant's petition to cancel this registration was denied, and the Court of Appeals now holds that there is no appeal and hence no way in which this ruling can be rectified, with the result that a

piratical trade-mark, under the apparent sanction and protection of the law, remains, in perpetuity,* upon the records of the Patent Office.

Conclusion.

For the reasons stated, it is submitted that the decision of the Court of Appeals of the District of Columbia should be reversed and the case remanded to that Court for further proceedings.

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(2495)

* There is no time limit set to registrations under the Act of 1920.

SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1926.

Postum Cereal Company, Incorporated, Appellant, *vs.* California Fig Nut Company.	Appeal from the Court of Appeals of the District of Columbia.

[January 3, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Postum Cereal Company and its predecessors in title have for years manufactured a cereal breakfast food to which they applied, as a trade-mark, the word "Grape-Nuts," for which they secured registrations under the Trade-Mark Registration Act of February 20, 1905 (38 Stat. 727) and amendments. They filed a petition of opposition to the registration by the California Fig Nut Company of the trade-mark "Fig-Nuts" which that company had registered under the Act of March 19, 1920, sec. 1, par. b, 41 Stat. 533.

Section 2 of the same Act provides that when any person shall deem himself injured by the registration of a trade-mark under the Act, he may apply to the Commissioner of Patents to cancel it. Upon due notice to the registrant, a hearing is to be had before an examiner of interferences in the Patent Office, with an appeal to the Commissioner. The California Fig Nut Company, the registrant, filed an answer denying that the petitioner was injured and taking issue within the averments of its petition. The examiner of interferences held against the petitioner and recommended that the registration be not canceled. An appeal was taken to the Commissioner of Patents, who affirmed the holding of the examiner of interferences.

An appeal was then taken from the decision of the Commissioner to the Court of Appeals of the District of Columbia. That court held that under the Act of March 19, 1920, 41 Stat. 533, there

was no jurisdiction given to that court to hear an appeal from the Commissioner of Patents. This holding was in accordance with a previous decision of the same court in *United States Suppression Inner Tube Company* v. *Climax Rubber Company*, 53 Appellate Appeals, D. C. 320, 290 Fed. 340. Accordingly the appeal was dismissed. The present appeal to this Court was allowed by the Court of Appeals.

The Trade-Mark Act of 1920, c. 104, 41 Stat. 533, is entitled "An Act to give effect to certain provisions of the convention for the protection of trade-marks and commercial names made and signed in the City of Buenos Aires in the Argentine Republic, August 20, 1910, and for other purposes." The first section provides that the Commissioner of Patents shall keep a register of all trade-marks communicated to him by the international bureaus as provided for by the Convention upon which a certain fee has been paid. Par. b of section 1 provides that all other trade-marks not registerable under the Act of February 20, 1905 (with certain exceptions not here relevant), but which have been in *bona fide* use for not less than one year in interstate or foreign commerce, upon or in connection with any goods of a proprietor upon which a fee of $10 has been paid to the Commissioner of Patents, may be registered under the Act, provided that the trade-marks which are identical with the known trade-marks owned and used in interstate commerce by another, and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or deceived purchasers, shall not be placed on the register.

The chief objection of the petitioner to the registration of "fig-nuts" as a trade-mark for a cereal breakfast food is that it is likely to cause confusion or mistake and deceive purchasers into thinking they are buying the petitioner's breakfast food marked and widely known as "grape-nuts."

Section 6 of the Act of 1920 adopts provisions of certain sections of the Act of February 20, 1905, 33 Stat. 728. But those sections do not include section 9 of the older Act by which provision is made for an appeal from the decision of the Commissioner of Patents to the District Court of Appeals, and for this reason the District Court of Appeals dismissed the appeal. The contention of the appellant here is that section 9 of the Act of 1905 does apply to the proceeding here taken under the Act of 1920, and that the

Court of Appeals in holding otherwise denied a right which the appellant here is entitled to have vindicated. It asks this Court to reverse the dismissal by the District Court of Appeals and in effect enforce the jurisdiction of that court to entertain its appeal from the Commissioner of Patents.

The first difficulty the appellant has to meet is the question whether this Court has jurisdiction to consider such an appeal. The argument the appellant makes is that this appeal was allowed July 1, 1924, to the judgment of dismissal by the Court of Appeals of April 7, 1924, that the Act of February 13, 1925 (43 Stat. 936, 941) amending section 250 of the Judicial Code left the old section applicable to such pending appeal, that by the old section 250, any final judgment or decree of the Court of Appeals might be re-examined in this Court upon error or appeal in cases in which the construction of any law of the United States is drawn in question by the defendant, that this appeal draws in question the construction of the Trade-Mark Act of 1920 given by the Court of Appeals, by which that court dismissed the appeal taken to it from the Commissioner of Patents, and that the dismissal from which this appeal was allowed was a final judgment under the cases of *Shaffer* v. *Carter*, 252 U. S. 37, 44 and *Baldwin Co.* v. *Robertson*, 265 U. S. 168. The case of *Baldwin* v. *Howard*, 256 U. S. 35, in which certiorari to this Court from a similar trade-mark proceeding was denied is explained by the appellant as resting on the sole ground that the judgment below was not a final one.

We do not think this course of argument can be sustained. Assuming for the purposes of this discussion, that the District Court of Appeals was wrong in not holding that section 9 of the Act of 1905 did apply to the Commissioner of Patents' decision under the Act of 1920, even so, an appeal can not be taken to this Court to remedy the error. The decision of the Court of Appeals under section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under section 4914 R. S. apply to an appeal taken from the de-

cision of the Commissioner of Patents in patent proceedings. *Butterworth* v. *Hoe*, 112 U. S. 50, 60; *Gaines* v. *Knecht*, 27 App. D. C. 530, 532; *Atkins* v. *Moore*, 212 U. S. 285, 291. Neither the opinion nor decision of the Court of Appeals under section 4914 R. S., or section 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this Court which can only review judicial judgments. This Court has so decided in *Frasch* v. *Moore*, 211 U. S. 1, in an appeal as to patent proceedings, and in *Atkins* v. *Moore*, 212 U. S. 285, as to appeals in trade-mark proceedings. This was the *ratio decidendi* of *Baldwin* v. *Howard*, 256 U. S. 35, already referred to, where both appeal and certiorari were denied in a similar trade-mark proceeding.

It was said in these cases that the appeal was denied because the action of the Court of Appeals was not a final judgment. This reason was a true one, but it should not be understood to imply that in such a proceeding, circumstances might give it a form that would make it a final judgment subject to review by this Court. That is the error that the appellant here has made in pressing its appeal. Appellant relies on *Shaffer* v. *Carter*, 252 U. S. 37, 44, holding that a judgment of dismissal for lack of jurisdiction is a final judgment for purposes of appeal. But the citation has no application in such a case as this. For here the action of the Court of Appeals in its dismissal was dealing with something which even if it should have been received, was not in the proper sense a judgment at all. Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this Court upon review, because the proceeding is a mere administrative one.

The distinction between the jurisdiction of this Court which is confined to the hearing and decision of cases in the constitutional sense and that of administrative action and decision, power for which may be conferred upon courts of the District is shown in the case of *Keller* v. *Potomac Electric Company*, 261 U. S. 428, 440, 442, 443. There it is pointed out that while Congress in its constitutional exercise of exclusive legislation over the District may clothe the courts of the District not only with the jurisdiction and powers of the Federal courts in the several States but also with such authority as a State might confer on her courts, *Prentis* v. *Atlantic Coast Line Company*, 211 U. S.

210, 225, 226, and so may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this Court or any federal court established under Article III of the Constitution. Of the jurisdiction of this Court, we said, at p. 444:

"Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in Muskrat v. United States, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and of the inferior courts of the United States, ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies. See also *Liberty Warehouse Co.* v. *Grannis*, decided this day.

With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the District Court if it had heard the appeal and taken administrative jurisdiction, and by the same token have now no power to review its action in refusing such jurisdiction.

But it is said that this leaves the appellant without any remedy to review the decision of the District Court of Appeals and makes its conclusion final in respect to the construction of the Trade-Mark Act of 1920. Even if this be so, as to which we express no opinion, it can not furnish a reason for exceeding the constitutional powers of this Court.

The appeal is dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.